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No. \_\_\_\_\_

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

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TIGER INN,

*Petitioner,*

—v.—

SALLY FRANK,

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF NEW JERSEY**

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October 1, 1990

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**QUESTION PRESENTED**

May the members of a private social organization, which satisfies all the criteria for the federal constitutional right to freedom of association (small number of active members, selective membership, financial independence, ownership of its land and building, closed to the public, no business conducted in it or by it, etc.), be deprived of the right to freedom of association because it has certain tenuous relationships with an entity that is not a private organization.

## LIST OF PARTIES

The parties to the proceeding below were the petitioner The Tiger Inn and the respondent Sally Frank. The University Cottage Club and Princeton University were parties originally but have settled with respondent and are not named as parties to this petition. The Ivy Club was a respondent-appellant below but has elected not to join in this petition.

Petitioner The Tiger Inn has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF NEW JERSEY**

The petitioner Tiger Inn respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of New Jersey, entered in the above-entitled proceeding on July 3, 1990.

**OPINIONS BELOW**

The opinion of the Supreme Court of New Jersey is reported at 120 N.J. 73, 576 A.2d 241 (1990), and is reprinted in the appendix, p. 1a.

The opinion of the Superior Court of New Jersey Appellate Division is reported at 228 N.J. Super. 40, 548 A.2d 1142 (N.J. Super. A.D. 1988), and is reprinted in the appendix, p. 38a. Neither of that Court's orders is reported. They are set forth in the appendix, pp. 221a, 223a.

Neither the orders nor the finding of probable cause of the New Jersey Division on Civil Rights have been reported. They are set forth in the appendix, pp. 68a, 140a, 158a, 180a, 230a.

None of the decisions of the New Jersey Office of Administrative Law (Miller, J.) have been reported. They are set forth in the appendix, pp. 81a, 143a, 169a.

## JURISDICTIONAL STATEMENT

The decision of the Supreme Court of New Jersey ordering Tiger Inn to consider women for membership was dated July 3, 1990. This petition is, therefore, timely. Jurisdiction is conferred by 28 U.S.C. § 1257 (Supp. 1989).

## STATUTES INVOLVED

*Amendment I of the U.S. Constitution.* Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*Amendment XIV, Section 1, of the U.S. Constitution.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Tiger Inn was founded in 1890 by a group of Princeton University students who sought to form a "select associa-

tion" for social, recreational and intellectual purposes. As long as it has existed, it has been off the Princeton University campus. In 1894, it purchased land on Prospect Street from a private individual without financial assistance from Princeton University and in 1895 built its present clubhouse, again without financial assistance from Princeton. (Record below "R." at 489a-90a; Testimony of Stuart Rickerson, August 1, 1986 "Rickerson" at 149.)

Today, as always, Tiger Inn is operated and controlled solely by its own members; is governed by its own constitution, bylaws, and certificate of incorporation; is not listed by Princeton University's Dean of Students as an official student organization; and is a self-governing entity. It is run by a Board of Governors, whose members belong to the club and are elected by members of the club. The Board holds meetings, keeps minutes, conducts elections, and enforces the bylaws of the club. (R. at 5327a, 5376a, 5380a; Rickerson at 123.)

The day to day operations of Tiger Inn are managed by a steward who is not an employee of Princeton University. No employees of Tiger Inn are Princeton University employees and none are covered by University-provided benefits. (Rickerson at 126.)

No business is conducted by the club anywhere nor is business conducted by anyone else on Tiger Inn's premises. Neither is any recruiting or career counseling conducted there. Non-members are welcome only as a member's invited guest and may not hire the facilities for any purpose. (R. at 5381a; Rickerson at 150.)

Tiger Inn is a selective organization having an active membership of only 125 (3% of Princeton's 4,000 undergraduates) and an inactive graduate membership of 1,700. The process of selection is rigorous and time consuming, with unanimous approval of the members necessary for admission. Many of the candidates who complete the process are not given offers of membership. The undergraduate members alone control membership policies. (Rickerson at 111, 155.)

Tiger Inn has its own IRS tax identification number and its own IRS employer identification number, both of which are distinct from Princeton University's numbers. It is organized under the New Jersey Not-For-Profit Corporation Laws, N.J.S.A. § 15:1-1, *et seq.*, and exempt from federal taxation under Section 501(c)(7) of the Internal Revenue Code. Tiger Inn pays all local and state taxes on its real estate. Unlike contributions to Princeton, which qualify as charitable contributions, contributions to Tiger Inn are not tax deductible. (R. at 463a, 538a; Rickerson at 125, 166.)

Tiger Inn is now and always has been operationally, financially, and physically independent of Princeton University in every way. No funds have ever been loaned or contributed by Princeton to Tiger Inn. Members of the Princeton faculty and administration do not participate *ex officio* or in any other way in the governance of Tiger Inn. Princeton faculty members do not conduct classes or seminars on club premises. At no time has any University dean or other official had any power to oversee Tiger Inn's activities. Tiger Inn is not listed among the student organizations which are under the authority of the Dean of Student Affairs. (R. at 5327a, 5380a; Testimony of Thomas Wright, August 4, 1986 "Wright" at 74.)

Further, University proctors may not enter the club without the express permission of a club member. Princeton University has no authority to direct Tiger Inn to take or not to take any action, has no jurisdiction over members of Tiger Inn as members, and has no jurisdiction at all over graduate members of the club. The Graduate Board of Tiger Inn disciplines members for disturbances connected with the club; and the local police are called for disturbances, if necessary. (Wright at 732; R. at 721a-22a.)

Tiger Inn is not a part of any club system, nor does it hold itself out as part of a club system. It is not a member of the Undergraduate Interclub Committee or the Graduate Interclub Council. Nor is it a participant in the Prospect Foundation, a non-profit organization supported by other clubs.



(Wright at 27; Exhibits to Tiger Inn's motion dated October 28, 1987.)

Tiger Inn draws its members primarily from the undergraduate body of Princeton University. This is the same as a private social organization in Washington, D.C., drawing its members exclusively from the District. In fact, choosing members from a single, definable pool of candidates is merely an exercise of the right to be selective.

The University does not rely on Tiger Inn to feed its 125 undergraduate members. Thomas Wright, the University's general counsel and an adverse witness, testified as follows:

if the disappearance of these three clubs at this time were to happen [Cottage, Ivy, and Tiger Inn], it would be an almost unnoticeable effect. (R. at 3070a.)

. . . if those students choices [to eat in private clubs] were to shift rapidly over time, we would adapt, and so I don't—I would not agree that we rely on, or [are] in some sense bound to permit the clubs to take a position. We would adapt if we had to. (R. at 3065a-66a.)

I believe we do not try to get the clubs to feed these students. That is not our intent at all. (R. at 3072a.)

Although others may have made statements about Tiger Inn and a relationship with Princeton University, the statements were not authorized or adopted by Tiger Inn.

In 1979, respondent Frank commenced an administrative action before the New Jersey Division on Civil Rights ("The Division") against Tiger Inn seeking, among other things, to force it to admit women. After research and careful deliberation, counsel for Tiger Inn and the Board of Governors concluded that the club was protected by the federal constitutional right to freedom of association and could select its members on any criteria it chose.

The Division on Civil Rights dismissed the complaint on the ground that Tiger Inn was a "distinctly private" organization. Respondent refiled. The Division investigated for two

years and dismissed again on the same ground. (Appendix "A." at 230a.)

Respondent appealed. The New Jersey Superior Court, Appellate Division, reversed, stating that a "trial-type" hearing must be held by the Division to determine whether or not Tiger Inn was a private social organization. (A. at 223a.)

Despite repeated requests by Tiger Inn and other parties, the Division never held a trial on the issue. Using certain stipulations reached in preparation for a trial, the Division reversed its position, concluded that Tiger Inn was a "place of public accommodation" within the meaning of the New Jersey Law Against Discrimination, and denied Tiger Inn the right to formulate its own membership policies. (A. at 180a.)

A trial on the issue of remedies followed. After a lengthy trial, the Administrative Law Judge concluded that Tiger Inn, on certain conditions, need not admit women. (A. at 81a.)

The Division reversed the Administrative Law Judge and ordered the clubs to admit women. (A. at 68a.) Tiger Inn appealed to the Appellate Division, which reversed and remanded to the Division for the trial it had ordered earlier on the question of private social organizations. (A. at 38a.)

Complainant obtained discretionary review by the Supreme Court of New Jersey; and on July 3, 1990, the Supreme Court reversed the Appellate Division, reinstating the Division's order that Tiger Inn admit women. (A. at 1a.)

In spite of lengthy argument, both written and oral, by counsel for Tiger Inn, both times in the Appellate Division and then in the New Jersey Supreme Court, no New Jersey court ever discussed the right to freedom of association in a decision in this case. If the issue is not reviewed by this Court, it will have been argued interminably before the Courts of New Jersey and ignored uniformly by all of them.

## **PRESERVATION OF THE FEDERAL QUESTION**

Tiger Inn raised the federal constitutional question repeatedly at every level; in its answer, whenever appropriate before the Division on Civil Rights, both times before the Appellate Division, and before the Supreme Court of New Jersey.

In a Letter Brief to the Appellate Division, dated October 12, 1982, which was the first time Tiger Inn was involved in formal proceedings, Tiger Inn argued the issue as follows:

**"IVY, TIGER AND COTTAGE CLUBS'  
RIGHT TO FREEDOM OF ASSOCIATION  
SHOULD NOT BE ABRIDGED.**

Plaintiff seeks to abridge the right to freedom of association to which the members of Ivy, Tiger and Cottage are entitled under the United States Constitution (First and Fourteenth Amendments) and the New Jersey Constitution 1947 (Article I)." [p. 17.]

A discussion of this Court's decisions on freedom of association followed.

After completion of the informal proceedings and the reversal by the Appellate Division, Tiger Inn asserted the following defenses in its answer:

**"FOURTH SEPARATE DEFENSE**

Respondent, The Tiger Inn, is not 'a place of public accommodation.'

**FIFTH SEPARATE DEFENSE**

Respondent, The Tiger Inn, is a bona fide private club."

On September 29, 1984, in its Brief to the Division on Civil Rights, Tiger Inn stated in POINT III:

**"THE RIGHTS OF CLUB MEMBERS TO  
FREEDOM OF ASSOCIATION AND  
PRIVACY SHOULD NOT BE ABRIDGED**

Complainant seeks to abridge the right to privacy and freedom of association to which the members of Tiger Inn, Ivy, and Cottage are entitled under both the United States and New Jersey constitutions. U.S. Const. Amends. I and XIV; N.J. Const. Art. I (1947)" [(Citations to cases omitted) (pp. 22-23).]

A discussion of this Court's decisions on freedom of association followed.

Tiger Inn's November 15, 1984 Reply Brief contained a 13-page discussion of this right and the way it applied to Tiger Inn.

During oral argument at the July 29, 1986 hearing before the Administrative Law Judge this point was debated extensively. Counsel for Tiger Inn said:

We are dealing with, in fact, we're dealing with at one level or another, the Federal Constitutional rights of freedom of association . . . .

In subsequent proceedings before the Office of Administrative Law, Tiger Inn raised the federal question in its brief as follows:

Freedom of association is not a mere appendage to the rights enumerated in the First Amendment. It is an independent constitutional value fundamental to the concept of liberty. Freedom from compelled association is a corollary of the freedom to associate. Thus, the First Amendment protects Citizens in their choice either "to associate or not to associate with whom they please." [(Citations omitted.) (Brief at pp. 13-14).]

In its November 20, 1986 Proposed Findings of Fact and Conclusions of Law, this statement was repeated on page 20.

In its Brief to the Appellate Division, Tiger Inn argued the federal constitutional issue extensively [Brief, pp. 12-14, 25-41.] One major section of the brief began:

**"TIGER INN IS A *BONA FIDE* PRIVATE  
CLUB EXEMPT FROM THE NEW JERSEY  
LAW AGAINST DISCRIMINATION**

Both the United States and New Jersey constitutions guarantee the right to privacy and freedom of association. Private clubs are protected by the right to freedom of association and the right to privacy. These rights are essential to our system of ordered liberty." [Brief at p. 25.]

Pursuant to New Jersey Rules of Practice, Tiger Inn's brief in the Appellate Division was transmitted to the Supreme Court of New Jersey and became the club's brief before that court. Its lengthy argument on the federal constitutional right to freedom of association was, therefore, before the Supreme Court; and a great deal of the oral argument was devoted to this issue.

**REASONS FOR GRANTING THE WRIT**

The decision below conflicts with the decisions of this Court that define the right to freedom of association. (POINT I). The issue presented by this case is important to a large number of individuals and private organizations. (POINT II). In the past, this Court has concluded that the First Amendment guarantee of freedom of association is afforded private clubs. But under the New Jersey Supreme Court's definition of a private club, few will qualify for these protections.

The New Jersey Law Against Discrimination was not an independent ground of decision. The federal right to freedom of association was considered by the administrative agency, as is reflected in its decisions. Both Appellate Division decisions were reached on procedural grounds. The New

Jersey Supreme Court had the issue before it but did not address it. For its own reasons, that court chose not to address the federal right to freedom of association, and to focus on the state statute. However, the case could not have been decided without considering the federal issue. As the New Jersey Supreme Court applied the state law, it conflicts with and was construed in a way to eradicate the federal right. When a state court construes a state statute in that manner, it is not "an independent state ground," and should not dissuade this Court from granting the writ. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) ("Even if the judgment . . . must nevertheless be understood as ultimately resting on [state] law, it appears that at the very least the [state] court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue . . . ."); *See also Xerox Corp. v. County of Harris, Texas*, 459 U.S. 145, 149 (1982); *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 388 (1986).

## POINT I

### The Lower Court's Decision Conflicts With Prior Decisions of This Court.

The United States Constitution guarantees the right to freedom of association, a right that is derived from the First Amendment. This Court has held "that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships." *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 544 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *Moose Lodge v. Irvis*, 407 U.S. 163 (1972) (dissenting opinion); *Bell v. Maryland*, 378 U.S. 226 (1964) (concurring opinion).

In a concurring opinion in *Bell, supra*, in which both Chief Justice Warren and Justice Douglas joined, Justice Goldberg stated:



it is the constitutional right of every person to close his home or club to any person or to choose his social intimates . . . solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties. [378 U.S. at 313.]

In a dissenting opinion which was joined by Justice Marshall, Justice Douglas said in *Moose Lodge*:

The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. [407 U.S. at 179-80.]

The constitutional protection of private clubs does not depend upon the truth, popularity or utility of the ideas and beliefs of their members. *NAACP v. Button*, 371 U.S. 415, 444-45 (1963). It protects citizens in their choice either "to associate or not to associate with whom they please." *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 288 (1984).

This Court has excluded clubs with a business purpose from the protections of the right to freedom of association. The evidence below clearly established that Tiger Inn is purely a social organization. There is no evidence of a business purpose or of any business conduct whatsoever. It is a fraternity with another name, and the college fraternity's right to base its membership qualifications on gender has been recognized by federal statute. 20 U.S.C. § 1681(a) (1990).

This Court has established the factors which determine whether an organization is public or private: size, purpose, policies, selectivity, and congeniality. *Roberts*, 468 U.S. at 620. As has been shown above, Tiger Inn is entitled to the

protection of the right to freedom of association if reviewed under these criteria.

The Court below recognized these factors but did not find that they sustained the federal right to freedom of association. Instead, it found Tiger Inn could not define its own membership criteria because of the following three conclusions:

- (1) The clubs were held out as part of a club system which serves Princeton students;
- (2) The clubs drew their membership almost exclusively from Princeton University students; and
- (3) Princeton relied on the club system to feed a majority of its upperclass students. (A. at 27a.)

None of these findings were directed at Tiger Inn. None of them changed Tiger Inn's status. None of them were significant. None of them amounted to more than the natural consequences of an incidental geographic association between Tiger Inn and Princeton University. The three elements are irrelevant to the fundamental constitutional right. Tiger Inn satisfied every single requirement for a private social organization. By finding that certain additional factors deprived Tiger Inn of the right to fix its own membership criteria, the New Jersey Supreme Court ignored (it never discussed the right) or ran afoul of (it took away the right) federal constitutional law.

In any event this Court is not bound by the three conclusions. They were drawn from stipulated facts; and unlike resolutions of disputed issues at a trial (no trial was ever held on this issue), conclusions drawn from undisputed facts may be reconsidered by an appellate court. *Norris v. Alabama*, 294 U.S. 587, 590 (1935); *see also Time, Inc. v. Firestone*, 424 U.S. 448, 463 (1976).

In spite of lengthy briefing and protracted oral argument (three hours), the New Jersey Supreme Court did not discuss the application of the federal constitutional right in as much



as one sentence of its opinion. Therefore, the criteria specified by this Court have never been applied to Tiger Inn's federal right by any of the courts of New Jersey, Supreme Court or Appellate Division. By allowing a few flimsy additional factors to negate a clearly proven federal right, the New Jersey Supreme Court's ruling conflicts with decisions of this Court.

## POINT II

### The Lower Court's Definition of a Private Club Will Have a Broad Impact.

This case has been universally recognized for years as one of national significance. When the Division, in 1985, first found against Tiger Inn, the Deputy Director of the Division stated that the decision "much more narrowly defines what is a club" and added that the Civil Rights Division anticipated more organizations falling within its jurisdiction. (N.Y. Times, May 15, 1985, at B2, col. 5.) In 1987, after reversing the decision of the Administrative Law Judge and ordering Tiger Inn to admit women, the Director of the Division said that her decision would have an effect reaching far beyond the immediate parties, and that it demonstrated that the Civil Rights Division "is viewing more narrowly the question of whether heretofore thought 'private clubs' are distinctly private in nature." (Division on Civil Rights, N.J. Dep't of Law & Public Safety, *Outreach*, Vol. 4, No. 3 (July-Sept. 1987) at 3, col. 1.)

Princeton University Counsel Thomas Wright said that this case would "set a precedent either way it's decided" and that "it's highly likely to be carried on into fraternity and sorority relationships." Counsel for Rutgers University, David Scott, and Rutgers University Dean of Fraternity Affairs, Terry Reilly, agreed with Wright and suggested that fraternities and sororities could be the next target of the Civil Rights Division and that there could be a far reaching effect across the country. (*Frank Case Implications Feared; Princeton Bias*

*Suit May Affect College Frats*, UPI, June 20, 1986 (NEXIS, Nexis Library, Omni file.)

Respondent, too, has predicted a far-reaching impact for a decision that Tiger Inn is not protected by the right to freedom of association. At least as early as 1985, when the Civil Rights Division reversed itself and held against Tiger Inn, respondent stated that "[t]he decision has implications beyond college campuses . . . ." (N.Y. Times, May 19, 1985, § 1, at 38, col. 4.) At various times the respondent has referred to this case as "part of national efforts", "part of a larger issue around the country", and "part of the broader struggle" aimed at private clubs. (Shearman, UPI, Oct. 4, 1988 (NEXIS, Nexis library, Omni file); *State Supreme Court to Hear Discrimination Case*, UPI, Sept. 14, 1989 (NEXIS, Nexis library, Omni file); *Princeton's Men-Only Clubs Go the Way of the Packard*, AP, July 7, 1990 (NEXIS, Nexis library, Omni file).)

In 1989, 5,238 fraternity chapters existed on 805 college campuses. The members of the fraternities numbered approximately 400,000 undergraduates and 4.1 million alumni. As of June, 1990, 2,661 collegiate and 5,583 alumni sorority chapters with a combined membership of more than 2.5 million women existed. (National Interfraternity Conference, 1989 Annual Report; National Panhellenic Conference, Membership and Statistics (1990).) Therefore, the decision below will affect not only the 125 undergraduate and 1,700 alumni members of Tiger Inn but also the first amendment rights of millions of individual members of fraternities, sororities, and other private clubs.

Tiger Inn is not the only private college social organization already involved in litigation. For example, Fly Club at Harvard has been sued (*Schkolnick v. The Fly Club*, 81-BPA-0087 (dismissed March 14, 1990)); and the Whiffenpoofs, the famous all-male singing group at Yale, were attacked for their failure to admit women. (N.Y. Times, April 20, 1987, at C12, col. 2.)

Although we focused our discussion on the immediate impact of the New Jersey Court's decision on college social organizations like fraternities and sororities, if the rationale of that decision is correct, the members of many private social organizations will be deprived of their right to freedom of association by the application of any tenuous relationship with a surrounding public entity, whether it be a university, a municipality, or another organization.

In all of its recent decisions this Court has had the opportunity to say what is not a private club. *See, e.g., New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225 (1988); *Roberts*, and *Rotary Club*, *supra*. This case offers the opportunity to clarify the factors that define a private club and to say what it is as well as what it is not.

## CONCLUSION

Tiger Inn is the most innocuous kind of social organization. But the right it represents is one of greatest importance to the 125 undergraduate members, who, under by-law and Board interpretation, determine Tiger Inn's admissions policies. The right is also vital to the many others who are similarly situated throughout New Jersey and the nation. We respectfully urge this Court to review the decision below.

Respectfully submitted,

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October 1, 1990



90-575

No. 2

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PHILIP J. MILLER

October 1, 1990



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Opinion of the Supreme Court of New Jersey  
Dated July 3, 1990

SUPREME COURT OF NEW JERSEY

A-125 September Term 1989

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SALLY FRANK,

*Complainant-Appellant,*

—v.—

IVY CLUB, TIGER INN, and TRUSTEES OF  
PRINCETON UNIVERSITY,

*Respondents-Respondents,*

—and—

UNIVERSITY COTTAGE CLUB,

*Respondent.*

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Argued January 30, 1990—Decided July 3, 1990

On certification to the Superior Court, Appellate Division,  
whose opinion is reported at 228 *N.J. Super.* 40 (1988).

[Appearances omitted]

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The opinion of the Court was delivered by  
GARIBALDI, J.

This appeal concerns whether the New Jersey Division on Civil Rights (Division) followed the proper administrative procedure in concluding that it had jurisdiction under the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 to -42 (LAD), over the Tiger Inn and Ivy Club (Clubs), all-male eating Clubs at Princeton University. Central to the resolution of the jurisdictional issue is whether the Clubs are

"places of accommodation" within the meaning of LAD, or are exempt from LAD because they are "distinctly private." The Division found that the Clubs have an integral relationship of mutual benefit with Princeton which deprives them of private status and makes them subject to the Division's jurisdiction. Whether the Clubs are "distinctly private" or have lost claim to private status by their association with Princeton University is initially a factual issue. The Clubs assert that material facts remain in dispute on this issue and hence, they should have been afforded a plenary hearing before the Division determined that it had jurisdiction. The Division and plaintiff assert that there are no material facts in dispute relevant to the issue of jurisdiction.

The procedural record discloses that the parties had numerous hearings before the Division and the Office of Administrative Law at which time they presented their factual contentions and legal arguments. The Appellate Division also reviewed this case twice. Based on our examination of the record, we find that this procedure accorded the parties their administrative due process rights. Moreover, we conclude that there are no disputed facts that are material to the jurisdictional issue; hence, the Division properly invoked its jurisdiction. We also conclude that the Division properly found that the clubs discriminated against plaintiff on the basis of her gender and affirm the Division's remedies against the Clubs.

## I

### A. *Procedural History Up To The Division's Finding of Probable Cause.*

This case has a protracted history. Plaintiff, Sally Frank was a student in Princeton in 1979 when she commenced the action. She since has graduated from Princeton, finished Law-School, and is now counsel of record in this case. The record consists of 31 volumes, comprising nearly 6,000 pages.

The saga began in February, 1979 when Frank filed a complaint with the Division against Princeton and three male-

only eating clubs associated with Princeton, namely, Ivy Club, University Cottage Club<sup>1</sup> and Tiger Inn, alleging that they had discriminated against her on the basis of her gender in violation of LAD. The Division refused to process that complaint.

In November of 1979 Frank filed another complaint, again alleging gender discrimination by the same parties. This complaint asserted that the Clubs were "public accommodations" because the Clubs functioned as "arms of Princeton. \* \* \*" and because they were public accommodations in their own right. The Club filed answers denying that they were places of public accommodation and denying that they functioned as arms of Princeton. They claimed they were "bona fide private clubs" and therefore exempt from jurisdiction under *N.J.S.A. 10:5-51*. Princeton filed an answer denying that it was a place of public accommodation "with respect to the eating and social activities of its students." Princeton also claimed that as a factual matter, the Clubs were not part of the University.

The Civil Rights Division dismissed Frank's complaints. The Appellate Division, emphasizing that it was taking no position of the merits, vacated the Division's order because of the Division's failure to make findings of fact and to grant a hearing, and remanded the matter to the Division for further proceedings consistent with its opinion.

The Division moved for reconsideration and for a clarification of the requirements of the remand. In its motion the Division advised the court of the procedure it intended to follow on remand:

In the absence of further guidance from the Court in this case, the Division would propose initially to hold a fact-finding conference in order to determine which, if any, of the mass of facts collected by the Division are actually in dispute, and whether there are further facts which the parties wish to bring to the Division's atten-

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<sup>1</sup> Cottage settled with Sally Frank and was dismissed from the case. It agreed to admit women members.

tion. Thereafter, if there were disputed issues of material fact, it would be appropriate to hold a plenary contested case hearing to determine jurisdiction. *If there are no material facts in dispute, the Division would issue a determined of jurisdiction containing appropriate findings of fact and conclusion of law, with further proceedings to be held if the Division has jurisdiction.* As previously indicated, however, the Division is of course willing to follow whatever procedures the Court mandates.

(Emphasis added).

The Appellate Division denied the Motion for Reconsideration, without any guidance as to what procedure should be followed. The Division, therefore, followed the procedure outlined in its motion.

Shortly after the Motion to Reconsider was denied, James Sincaglia, Chief of the Bureau of Enforcement for the Division, brought the parties together to begin the fact-finding process. Frank served interrogatories on the Clubs and Princeton. The University responded by making hundreds of pages of documents available for inspection and copying to all parties. Many of these documents were then submitted to the Division. The Clubs served interrogatories on Frank. The parties also exchanged lists of proposed stipulations and each side noted on the other's list those stipulations that were acceptable and those that were disputed.

The Chief held two day-long fact-finding conferences in March and April, 1984. During the conferences the Chief lead the attorneys through the lists, noting those facts to which everyone agreed to stipulate and conducting a painstaking discussion on those facts disputed by the parties. In addition, the parties introduced documents, presented unsworn testimony, cross-examined witnesses and presented both oral and written legal arguments. The Chief accepted only documents that the parties agreed were authentic.

After the two-day conference hearings, the record was kept open until April 30, 1984 to allow the parties to submit addi-

tional documents. On May 31, 1984, the parties were served with the Chief's formulation of the stipulations discussed at the Conference (Accepted Stipulations and the Chief's Rulings). In his letter the Chief stated that "your review of these rulings will demonstrate that sufficient evidence existed in the record to issue Findings on the disputed stipulations. Therefore, no material facts remain in dispute. You will be expected to raise any objections to the stipulations and rulings—not previously proffered within ten days."

The stipulations fell into three categories:

- (1) Stipulations accepted as proposed;
- (2) Stipulations not accepted as proposed but resolved by the Division on the basis of evidence (mostly documentary) submitted by the parties; and
- (3) Stipulations neither accepted nor rejected because they required legal conclusions of the kind that would be made by the Division upon review of the entire record.

The vast majority of the stipulations were accepted as proposed. Of 39 stipulations proposed by Sally Frank, 29 were accepted. Eight fell into the second category and two fell into the third category. The Clubs submitted 191 stipulations. 180 were accepted, ten fell into the second category and one required resolution by the Division upon review of the entire record. Thus, over 200 stipulations were accepted as proposed. It is the eighteen stipulations that fell into the second category of stipulations—those disputed by the parties but resolved by the Chief on the basis of documentary evidence, unsworn witness testimony and discussions at the Conference that give rise to the controversy underlying this appeal.

The parties filed comments and objections to the Chief's proposed rulings. The entire record was then transferred to the Director. The parties submitted briefs to the Director wherein Ivy and Cottage wrote "[n]ow after nearly 12 months of supplemental investigation, this matter is being submitted to the Director of the Division on Civil Rights for a final ruling as to whether jurisdiction exists." Tiger acknowledged that its brief was being submitted "on the sole



issue raised by this proceeding: Whether the Division has jurisdiction over Tiger under the Law Against Discrimination."

The Division issued a "Finding of Probable Cause" on May 14, 1985 (the "Finding"). The Finding established that the Division had jurisdiction over the Clubs and that probable cause existed to believe that the Clubs had discriminated against women. The bulk of the document was dedicated to a discussion of jurisdiction. At the beginning of the jurisdiction portion of the Finding, "Undisputed facts" are set forth, extracted from Stipulations submitted and agreed to by the parties and from documents submitted by them. Authenticity of the documents is not in dispute.

*B. Facts Derived From the Division's Finding of Probable Cause*

Princeton University is a private, non-sectarian institution of higher education, founded in 1746. The University is located in Princeton, New Jersey. From 1746 to 1968, Princeton University admitted only male students as undergraduates. In 1969, the University for the first time admitted women as undergraduate degree candidates.

From approximately 1803 to 1843, Princeton University required all undergraduate students to take their meals in commons operated by the college steward. In 1843, Princeton permitted its undergraduate students to board off-campus. The Princeton college refectory burned down in 1856 and was closed for fifty years. During that time, all students took their meals in boarding houses that were not affiliated with the college. In the mid-1800's several groups of Princeton students formed "select associations" to reduce the cost of their off campus living and dining expenses. By 1876 twenty five "select associations" or eating clubs were in existence.

The club system associated with Princeton University, which began with these "select associations," presently [sic] consists of thirteen clubs, eight of which are non-selective clubs and five of which are selective clubs. Campus, Charter, Cloister Inn, Colonial, Dial Lodge, Elm, Quadrangle and

Terrace are the eight non-selective clubs. These clubs, formerly all male and selective, are now co-ed. The non-selective clubs offer social, recreational and dining activities.

Admission to the non-selective or open clubs is by a lottery system. Students who are not accepted into the "open clubs" of their choice are given the opportunity to go through subsequent lottery rounds at any "open club" that has additional available contracts to offer.

The five selective clubs are Ivy, Cottage, Tiger Inn, Cap & Gown and Tower. The selective clubs also offer social, recreation and dining activities. Tower, Cap & Gown and Cottage accept male and female members. From their inception until the present, Ivy and Tiger have only accepted male members.

Ivy was found[ed] in 1879. During its 110 years it has occupied four different clubhouses, all of which it either owned or rented independently of Princeton University. It now owns the land and clubhouse at 143 Prospect Street in Princeton and pays all of its local and state taxes, maintenance, utility and insurance costs. Ivy is incorporated in New Jersey, tax-exempt under the Internal Revenue Code and at one time had a liquor license. It is supervised by a Board of Governors. It has 3 classes of membership: honorary, graduate and undergraduate.

As of 1984, Ivy had 1,500 graduate members, 79 undergraduate members and 39 sophomores who accepted bids. Ivy's Constitution does not require that the Club's membership be restricted to men. Tiger was founded in 1890. Its history parallels that of the Ivy. Its membership rules and constitution are also similar to Ivy's.

Membership in the selective clubs is presently by invitation only. The general public is not invited to join Tiger or Ivy. Bicker is the term the five selective Clubs use for the process of interviewing and selecting new members. The sophomore class at one time administered Bicker, but ceased doing so in 1978. Since 1978, the sophomore class has not provided direct funding for the bicker process. The process is now totally funded by the individual Clubs.

Since at least 1977, there has been a fall and spring Bicker. Spring Bicker has taken place in late January to early Febru-



ary. Fall Bicker is an optional activity for selective clubs and is usually restricted to seniors. Two purposes of fall Bicker are to fill section sizes to their optimal level and provide new members with an introduction to the Bicker process.

The Clubs administer fall Bicker entirely. The Committee on Bicker Administration (CBA), made up of students, presently coordinates spring Bicker. The CBA has, in the past, used University office space to coordinate its week-long Bicker effort. At one time the University assessed no rental charge, but does so now.

The Bicker process is divided into steps: (1) registration; (2) Bicker sessions; (3) bid sessions, and (4) sign-in. Since at least 1977, Bicker sessions consist of visits made by the Bickerees to each of the selective clubs, and are held every night. The primary purpose of Bicker sessions is to give Club members the opportunity to individually evaluate the Bickerees as prospective Club members.

A bid session is a meeting of the Club members to decide which Bickerees will be invited to join a selective eating Club. A bid is an invitation to join one of the selective Clubs. There is not a set number of bids that each Club is required to offer, and the process whereby Bickerees are extended invitations to join varies from Club to Club. Since at least 1977, after each Bicker session, members of Tiger Inn and Ivy have submitted written comments to their Bicker chairman about each Bickeree with whom they had significant contact. These confidential comments are read at bid sessions.

Undergraduate members of Ivy are elected by consensus at a meeting of a majority of its current membership. Tiger Inn requires unanimous agreement of its undergraduate members for a sophomore to be admitted. Cap & Gown, Cottage and Tower require a  $\frac{2}{3}$  majority vote of their memberships for a sophomore to be admitted. In 1984, 114 sophomores completed Bicker at Ivy: 40 received bids and 19 accepted their bids. At Cottage Club, 107 sophomores completed Bicker: 72 received bids and 69 accepted. At Tiger Inn, 112 sophomores completed Bicker: 91 received bids and 70 accepted. Cap & Gown had 114 sophomores who completed Bicker: 85

received bids and 70 bids were accepted. At Tower, 106 sophomores completed Bicker: 71 received bids and 69 bids were accepted.

The Clubs require their undergraduate members to pay an initiation fee together with a yearly fee for board and social activities. All fees are paid by the student directly to the clubs. These fees are not part of Princeton University's undergraduate tuition. Membership dues and contributions to Ivy and Tiger are not tax deductible as contributions to educational institutions. Respondent Clubs provide food for consumption on their premises by contract with club members, the club agreeing to provide specific meals to their members for specific sums. All the Clubs charge members who bring a guest to dinner for the guest's meal unless the guest holds a University dining contract, and both the club member and the guest use[ ] the Meal Exchange Program.

Respondent Clubs at times have paid for and placed announcements in *The Daily Princetonian* which advertise Bicker, open-house-events and parties. The Clubs are rented out from time to time to club members or their relatives for private non-club functions which are attended by non-members. Employees of the Clubs are not employees of Princeton University. Employees of the clubs are not covered by University-provided benefits such as health insurance, pension plans or Social Security contributions.

The Clubs use zip code 08540. Zip code 08544 is only used by Princeton University. Respondent clubs do not have campus mail delivery, nor can they use Princeton University's non-profit mailing permit.

Princeton University requires all freshman and sophomore students to have University dining contracts. Princeton University juniors and seniors generally dine in one of the following ways (figures are for 1983-84): DS (dining service) contracts (191); club membership (1570); living off-campus (98); living in Spelman Hall, apartment-style with kitchens (156); living at 2 Dickinson Street and participating in the co-op there (20); and living in other upperclass residential halls and eating in an undetermined manner (194).

Adlai Stevenson Hall is a University-operated facility consisting of two buildings at 83 and 91 Prospect Street. It was originally founded in 1970 after the University purchased the facilities of Court and Key & Seal Clubs, both now defunct. Any junior or senior may hold a meal contract at Stevenson Hall. In addition, a limited number of juniors and seniors may hold a meal contract at each of the residential colleges. Some of these are "Resident Advisors," appointed to counsel freshmen and sophomores. Others are selected through a "college lottery" system, under which a small number of upperclassmen are allowed to continue to reside in the residential college where they resided as underclassmen.

The Club system has consistently been the most popular eating option available to upperclass students. In school year 1983-84, 1570 out of 2230 of Princeton's juniors and seniors took meals at one of the eating clubs.

Three meal-exchange programs exist between the University foods services and Respondent Clubs. The general Meal Exchange Program allows students to dine with their friends at other facilities at no additional cost. The Program is administered, and all costs are jointly shared, by the Interclub Council and the University's Department of Food Services. The general Meal Exchange Program works as follows: if a Club member invites a Princeton student having a University dining contract to a meal at his club as his guest, and the guest reciprocates and invites the club member to dinner at a University dining facility within one calendar month, neither party will be charged for the guest's meal. If no reciprocal meal is exchanged within one month, the sponsor will be charged for the guest's meal by his Club or the University.

The Upperclass Choice Meal Exchange provides sophomore class members with the opportunity to eat in facilities they may select for their junior year without the expenditure of additional funds. The meal exchange operates during the fall from the first Monday of November through the first Thursday in December. The precise dates are established by the Upper Class Choice Committee and the University Department of Food Services. The program is for dinner meals, typically Monday through Thursday. The Department of Food

Services reimburses the individual clubs per dinner meal for contract-holders who participate in the program.

The Sophomore Club Meal Participation Program allows sophomores who are new members to dine at a club during the spring semester of their sophomore year. The University reimburses the Club a percentage of the University food costs for the meal. At Ivy, the sophomore member is charged the difference between the University's reimbursement and the club's charge for the meal.

University proctors are not responsible for the security at Tiger Inn or Ivy and do not regularly patrol the Club's grounds or premises. Princeton University students involved in off-campus altercations are subject to discipline by the University. Princeton University has no authority to discipline a graduate member of Tiger or Ivy for objectionable conduct by that graduate member on the club's premises. Tiger and Ivy discipline their own members for disturbances connected with the clubs regardless of whether any action was taken by public or University authorities.

From at least 1977, Tiger and Ivy have not been listed as officially recognized student organizations by the Dean of Students of Princeton University. Princeton University does not presently provide any assistance to Tiger or Ivy in their fund-raising efforts. However, the Princeton University Alumni Records and Mailing Services ("ARMS") makes certain services available to University alumni, including supplying updated mailing lists and processing mailings. There is a single rate-sheet for all such services, applicable to the eating clubs and to other outside organizations. Tiger and Ivy have used some of these services.

A review of documents submitted from the late 1960's and mid-1970's give some indications of the relationship between Princeton University and the Clubs during two time frames—just prior to the admission of women to Princeton University in 1969, and just prior to Sally Frank's admission to Princeton in 1976. In 1967, as part of the Minutes of the May 1, University Faculty Meeting, an Interim Report of the Subcommittee of the Faculty Committee on Undergraduate Life

described the relationship between the University and the Clubs as follows:

The University itself provides no dining facilities for most upperclassmen but sanctions the private eating clubs as virtually the only dining and recreational facilities regularly made available to approximately ninety per cent of the upperclassmen. There are not alternatives in suburban Princeton or in the Wilson Society that could accommodate a large percentage of those undergraduates.

Once considered tangibly "off" campus, the clubs are now visibly "on" it, surrounded (by many campus buildings). Yet the University does not own the clubs or their land, and it does not manage their operations or purchase their supplies. \* \* \* The quality of the food, the physical facilities, and the activities vary from club to club.

The University's responsibility for the utilization of the clubs by the undergraduates is revealed in many ways. Resolutions of the Trustees have established their jurisdiction over undergraduate membership in the clubs. A week's recess is allowed in the University calendar each year for Bicker. Information on Bicker is provided for sophomores with the assistance of the office of the Dean of Students, who exercise some supervision over the proceedings. Conduct of the undergraduate members within clubs is regulated by the University under the Gentleman's Agreement which delegates responsibility for enforcing its provisions largely to the undergraduate members and the officers of the individual clubs, under the supervision of the Undergraduate Inter-club Committee. University regulations govern the board payment of scholarship students, and the University endorses an agreement that protects the financial stability of the clubs as a group by limiting the size of the membership in any one of them. The University Health Services are implementing their proposal for the inspection of club kitchens. Intramural sports for upperclassmen are orga-



nized on the basis of the clubs (and the Woodrow Wilson Society).

In sum, the University and the clubs are now mutually dependent on each other. The clubs depend on the University for an annual supply of undergraduates that virtually insures the continuance of the system; the University depends on the clubs for dining and recreational facilities. In the past, the University has exercised its responsibility for providing these facilities to upper-classmen largely by delegating it, with a minimum of surveillance and a minimum of initiative to improve the clubs. [MINUTES OF THE UNIVERSITY FACULTY MEETING OF MAY 1, 1967].

In 1973, the University proposed to the Clubs a jointly-funded study of the club system by Haskins and Sells. The purpose of the Study was "to outline all of the options available to develop a system of operation that would be financially and socially viable to the Clubs and to the University." The study was proposed at a time when the Clubs were foundering financially due to a decline in membership. There was apprehension that some Clubs might go out of business.

The Haskins and Sells Study, released in April of 1975, set forth a long list of options for dealing with the problems facing the Club system. These options fell into three general categories: options requiring University policy changes, options involving only the Clubs; and options requiring ongoing University involvement with the Clubs.

By October 23, 1975, the University took short-term actions to assist the Clubs, which included help in the collection of overdue accounts and planning for Club participation in the freshman orientation program. Other actions taken by the University within the next year included:

- (1) Adoption of the Board of Trustees resolution "reaffirming the University's view that the Club system provides an important social option for undergraduates and expressing again the sense of the Board that this form of social alternative should continue to be available."

- (2) The Office of the Dean of Student Affairs assisted the clubs in collecting overdue bills from their members.
- (3) The new student handbook included a description of the Club system.
- (4) Arrangements were made for a presentation of the clubs to be a part of the freshman orientation. This proved to be a successful tactic in improving membership.
- (5) Assistance was provided to the clubs for snow removal from their front sidewalks by University personnel.

Sally Frank was a student at Princeton University from September 1976 through June 1980, when she graduated. During that time, Sally Frank did not join any of the non-selective eating clubs. During spring 1979 Bicker, Sally Frank was permitted to bicker at the Ivy Club. However, Ivy's president told her that she could speak to Ivy members only when there were no sophomore men waiting to speak to Ivy members. Sally Frank spoke to at least one Club member at each of the Bicker sessions. She did not receive a bid from Ivy. During spring 1979 Bicker, Sally Frank bickered at Tower Club and Cap & Gown. She did not receive a bid. During Bicker of 1980, Tiger Inn, Cottage and Ivy refused to permit Sally Frank to Bicker.

From these facts, the Division issued eleven factual conclusions. The Clubs essentially agree that the Division's Finding of Probable Cause was based only on stipulated facts. Their dispute is that the Division's factual conclusions are unjustified by those undisputed facts. The factual conclusions follow:

1. A Club system provides dining facilities for a majority of upperclass students attending Princeton University.
2. Respondent Clubs are part of this Club system associated with Princeton University.

3. Princeton University relies on these Clubs to feed a majority of their upperclass students.
4. Without the Clubs, Princeton University would incur substantial costs and would have to make major changes in the provision of dining services for upperclass students.
5. Princeton University has an interest in the continued viability of the Club system and has taken actions based on that interest.
6. The Clubs are characterized by the Clubs and Princeton University as servicing Princeton students and recruit members almost exclusively from Princeton University.
7. The Clubs work with one another and with Princeton University through organizations like the C.B.A. and the Interclub Council.
8. The link that ties the individual Clubs together is their association with Princeton University.
9. The Clubs would not continue in their present form with Princeton University.
10. Princeton University and the Clubs are integrally connected in a mutually beneficially relationship.
11. Non-members of respondent Clubs, particularly but not exclusively, Princeton University students, can participate in many of the respondent Clubs' activities and use the respondent Clubs' facilities.

The Division concluded based on these facts that the relationship between the Clubs and Princeton University is one of integral connection and mutual benefit that negates the Clubs claims that they are "distinctly private" entities. The Division rejected the argument that the Club members' constitutional free-association rights would be violated if the Clubs were subject to LAD. The Division then discussed briefly the issue of discrimination. On the basis of undisputed



facts, the Division determined that probable cause existed to believe that the Clubs discriminated on the basis of gender.

*C. Procedural History After Division's Finding of Probable Cause.*

After the Finding of Probable Cause was issued, Frank requested that the matter be transferred to the Office of Administrative Law (OAL). In July 1985, the case was filed as a "contested case" at OAL. Sally Frank moved for Partial Summary Decision on the issue of jurisdiction. The Clubs opposed the motion. The ALJ requested the parties to advise him of any material facts in dispute. The Clubs submitted no affidavits to the ALJ other than a certification of attorneys for Ivy, which recited only the procedural history of the proceedings before the Division. The parties placed before the ALJ the agreed stipulations of fact and a list of the documents which had been submitted in evidence before the Division. Both Ivy and Tiger also submitted briefs in response to Frank's motion. Those briefs however, recited very few alleged material facts in dispute. The only facts specifically alleged to be in dispute were the selectivity of the hat bid procedure, the existence of an Inter-club agreement, and the extent to which club facilities are available to the general public. In response, Frank pointed out that the Clubs had failed to identify material facts in dispute and had failed to identify any specific document that they claimed was irrelevant.

Based on the submissions before him, the ALJ granted Frank's motion and, on December 12, 1985, filed an Initial Decision granting Partial Summary Decision on the jurisdictional issue. The ALJ's decision was based on a determination that the Division's Finding should be construed as the final agency determination on the issue of jurisdiction. This determination was based on two factors. First, the ALJ found that the Division had intended its finding of jurisdiction (as opposed to the finding of probable cause on discrimination) to be final. Second, the ALJ considered the determination of jurisdiction to be the "law of the case"

because (1) the finding of jurisdiction had been "careful, thorough and comprehensive;" (2) the procedure had been fair; (3) the legal analysis had been extensive, cogent, well-reasoned and persuasive; and (4) the re-determination of the issue would be "duplicative, repetitious, time-consuming and wasteful." The ALJ also found there were no material facts in dispute and that the facts that the Clubs alleged were disputed had been found to be immaterial. For example, the ALJ clarified that the Inter-Club Agreement was not admitted for its truthfulness but to show that ties existed between the respondent Clubs, the other Clubs and Princeton.

After giving notice that she would do so and receiving exceptions but no affidavit in support of those exceptions, the Director on February 16, 1986, issued an Order of Partial Summary Decision on jurisdiction which adopted the recommendations of the ALJ. The Director's Order of Partial Summary Judgment stated that "after a careful review of the materials submitted to ALJ Miller and the exceptions filed by the clubs," the Director found "[n]o *genuine* issue of *material* fact remain[ing] in dispute." Because no material facts were in dispute the Director found that a full hearing on jurisdiction at OAL would be "duplicative, repetitious, time consuming and wasteful."

In support of her finding that no full hearing would be required, the Director reviewed the Clubs' opportunity to demonstrate to the ALJ what facts were allegedly in dispute, and the fact that the Clubs had submitted no affidavits in support of their assertions that there existed disputes concerning material issues of fact. The Director also noted that the two documents claimed by the Clubs to be inaccurate were party-admissions by Princeton University, then a Respondent, and that the Clubs had submitted no evidence to contest these documents. The Director also addressed fully the Clubs' arguments concerning facts alleged to be in dispute. The Director deemed the existence of an Inter-club agreement to be immaterial in light of the undisputed facts that the agreement was published in a University booklet and that unsigned copies were available at the Dean's office. Even assuming no agreement was ever executed, the University held the agree-

ment out to the students as existing. This, not the actual execution, was the importance of the agreement." The Director also noted that although the Clubs alleged that there were disputes of fact concerning the hat-bid and the availability of public access to the clubs, her conclusions concerning those issues were drawn either from stipulations or from the testimony of the Clubs' own witnesses and affidavits submitted by the Clubs.

The Director also pointed out that the Clubs' dispute over certain conclusions in the jurisdictional finding did not raise issues of material fact but rather were simply disputes over conclusions drawn from undisputed facts. Examples of such conclusions include the finding that Princeton University and the clubs are "integrally connected" and that there was a significant relationship between the University and the Clubs. The Director also noted that the Clubs had failed to point to any evidence that could be introduced at a hearing that would raise a dispute concerning these conclusions. Finally, the Director observed that the Clubs had had at least three opportunities to place before the Director any evidence that they wished to have her consider and to demonstrate that there were material issues of fact in dispute. The Director concluded that the clubs had failed to "demonstrate . . . further facts or evidence that could be introduced to justify or necessitate a full hearing."

The Director then addressed the Clubs' argument that "regardless of the process implemented by the Division on Civil Rights, they [were] entitled to a full hearing at the Office of Administrative Law based on the Administrative Procedure Act, the guarantees of due process and fundamental fairness and the Appellate Division Decision remanding the case to the Division." Relying on *Cunningham v. Civil Service Comm'n*, 69 N.J. 13 (1975), the Director noted that the Clubs were "entitled to a hearing only [sic] if they made an offer of proof supported by an affidavit to show genuine issues as to any material fact." Since no material facts were shown to be in dispute, the Director concluded, "the Clubs were given all they were entitled to—the opportunity to present argument orally or in writing \* \* \*." On the basis of

the foregoing, the Director affirmed the finding of jurisdiction and remanded the matter to the ALJ for further proceedings on the issues of liability and remedy.

The University Cottage Club settled with Frank on February 24, 1986. The ALJ issued an Initial Decision on liability on June 16, 1986, granting Frank's Motion for Partial Summary Decision. He ruled that liability existed with regard to the two Clubs on the basis of undisputed facts. Summary decision was not proper with regard to Princeton, however, because more information was necessary to address the issue of what constituted the alleged "aiding and abetting" discrimination by Princeton. On July 22, 1986, Frank and Princeton entered into a Stipulation and Order of Partial Settlement. Princeton continued to participate in the proceedings because of the potential involvement it would have in whatever remedies were ultimately ordered by the Division.

On July 28, 1986, the Director adopted the ALJ's Initial Decision of Partial Summary Decision on liability respecting the two clubs. The Director found the claims against Princeton were moot based on the settlement agreement between Frank and Princeton. There was no appeal from that determination. The Order remanded the matter back to the OAL for further proceedings on damages and remedies to be afforded Frank. Following that remand, the ALJ conducted plenary hearings for six days between July 29 and August 6, 1986, during which sworn testimony, subject to cross-examination, and additional documents were admitted as evidence.

On January 29, 1987, the ALJ issued his Initial Decision on the issue of damages and remedies. His decision proposed the following remedies:

(a) that Ms. Frank be awarded \$2,500 in compensatory damages by the two Clubs;

(b) that Ms. Frank *not* be awarded membership in either club;

(c) that the two Clubs should sever certain ties to Princeton in order to attain 'distinctly private' status under *N.J.S.A.* 10:5-5(1);

(d) that Princeton should avoid reference to the two Clubs as being affiliated or connected with the University in all future publications.

On May 26, 1987, the Director issued the Final Administrative Decision and Order, which adopted the ALJ's recommendation denying club membership to Frank, increased the award of humiliation damages to \$5,000 and rejected the ALJ's recommendation that the Clubs be ordered to sever their ties with Princeton instead of ordering them to admit women. The Director found that such a result was neither possible nor desirable and "that in any event ordering the clubs to sever the ties instead of ceasing their discriminatory practices was counter to the purpose of LAD." The Director entered a cease and desist order directing the clubs to admit women as members.<sup>2</sup>

Ivy and Tiger appealed to the Appellate Division. The Appellate Division partially reversed the Division and remanded the case to the Division for new proceedings. The court rejected the Clubs' contention that they had a right to a hearing *before* the Division made its threshold determination of probable cause. The court likewise rejected the contention that the fact-finding conference should have been conducted by the Director herself and not by the Chief of the Enforcement Bureau.

The court based its reversal, however, on the fact that the Chief had exceeded his authority by resolving disputed facts and that the Division, by relying on the facts as resolved by the Chief, had abused its discretion. Thus, according to the Appellate Division, the Division had bootstrapped disputed facts into undisputed facts and then relied on those facts in

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<sup>2</sup> Both clubs recently voted to end their policy of not admitting women. In order for the policy change to become final, however, each club will need to confirm its vote within one year of the initial vote and then each club's graduate board consisting of alumni must approve the policy change.



coming to its conclusions. Accordingly, the Appellate Division found that there were material facts in dispute concerning the jurisdictional issue. Hence, the Clubs were entitled to a plenary hearing on the question of jurisdiction. The Appellate Division, therefore, reversed the finding of jurisdiction and probable cause, vacated the order of remedies, and remanded the case to the Division with instructions to forward the case to the OAL to conduct a trial-type hearing on the issue of (1) jurisdiction, (2) discrimination and (3) remedy.

Sally Frank then petitioned this Court for certification, arguing that the Appellate Division failed to defer to the Division's substantively correct and procedurally fair decision, designed to eradicate a particularly offensive form of discrimination, and that failure to correct the Appellate Division's erroneous decision to remand will result in significant individual and societal harm.

After first considering the matter, we remanded the case to the Appellate Division, specifically "for the limited purpose of clarifying [Appellate Division] opinion to indicate what material facts remain in dispute, the determination of which is essential to a meritorious disposition of the case . . ."

The Appellate Division filed a *per curiam* opinion stating that "all unstipulated facts, documents and other evidence are material and remain in dispute and must be resolved in a trial-type hearing before there can be a disposition of the case on the merits." We granted certification, \_\_\_\_ N.J. \_\_\_\_ (1989).

## II

### A. Necessity of Plenary Hearing

It is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case. *Cunningham v. Civil Services*, 69 N.J. 13, 24-25 (1975). The mere existence of disputed facts is not conclusive. An agency must grant a plenary hearing only if *material* disputed adjudicative facts exist. *Bally Mfg. Corp. v. Casino Control Com'n*, 85 N.J. 325, 334

(1981), app. dis. 454 U.S. 804 (1981); *Cunningham v. Dept. of Civil Service*, 69 N.J. at 24-25. N.J.S.A. 52:14-B-9. The key issue therefore is whether any material facts remained in dispute when the Director made her final decision. Based on an examination of the record we find that no material facts in dispute exist with respect to the issue of jurisdiction and that the administrative procedures followed fully comported with administrative due process.

The procedural history discloses that this is not a case where the parties did not have a hearing or an opportunity to present their evidence and legal positions. The parties had a two-day fact-finding conference. While testimony at the fact-finding conference was unsworn, parties were allowed to present and cross-examine witnesses, introduce documents and question and examine the documents. Indeed, the conference resulted in 200 factual stipulations.

Moreover, N.J.A.C. 1:1-12.5(b) provides in relevant part:

When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding.

*Cunningham v. Civil Service*, *supra*, 68 N.J. at 25 (party opposing summary disposition motion must submit affidavits to support claim that material facts are in dispute). The procedural history discloses that the Clubs had several opportunities specifically to submit affidavits setting forth the material facts in dispute to the Chief, the Director and the ALJ. The record discloses that the Clubs made minimal efforts to identify allegedly disputed facts and submitted no affidavits in response to Frank's motion for partial summary judgment.

The major disputes between the parties on the jurisdictional issue all relate to the fact-finding conference and the Division's Finding of Probable Cause. Specifically:

1. Whether the Clubs were led into a "trap" that the Fact-Finding Conference could result in the resolution of the jurisdictional issue;

2. Whether Chief Sincaglia's resolution of eighteen disputed facts were relied on by the Division in its jurisdictional decision; and

3. Whether there are any material facts in issue relevant to the jurisdictional issue.

#### *B. The Fact Finding Conference*

First, we reject the Clubs' assertion that they were ignorant of the possibility that the results of the fact-finding conference would determine jurisdiction. 228 *N.J. Super.* at 61. The Division repeatedly assured all of the parties that the fact-finding conference was intended to produce a binding determination on the issue of jurisdiction.

The first mention of the fact-finding conference occurs in the Division's petition for rehearing. In that petition, the Division proposed the fact-finding conference as the procedure it would employ in the first instance. In that proposal, the Division clearly stated that the fact-finding conference would lead to a "determination of jurisdiction" if no material facts were in dispute.

This proposal was restated in subsequent letters to the parties advising them of the procedure. In a letter dated October 5, 1983, the Director advised the parties that

[a]s indicated herein, the purpose of the Fact Finding Conference is to make a preliminary determination as to whether there are material facts in dispute. In the event that there exists [sic] genuine issues of material fact, the Division will conduct a public hearing to resolve the disputed issues. The parties will then be required to submit proposed findings of fact and conclusion [sic] and thereafter the Director will issue a decision as to jurisdiction.



In a letter to Sally Frank dated October 26, 1983, with copies to all parties, the Director again set out the purpose of the Conference:

[t]he Fact-Finding Conference hopefully will resolve the jurisdictional issue in this case. \* \* \* If jurisdiction is found to exist, there will be an additional conference regarding the probable cause issue. \* \* \* In the event that the Fact Finding Conference does not resolve the issue of jurisdiction, I will again review the matter for possible submission to a hearing.

If there was some confusion about the scope of the Conference it only galvanized the parties to investigate thoroughly the potential ramifications of this fact-finding process. All of the parties wrote to the Division requesting clarification of the procedure and its possible effect. Interrogatories were circulated to help generate a universe of stipulation facts and those interrogatories were, themselves, the subject of some confusion. The Clubs were not alone in their concern about the extent of protection to be afforded by the procedure. Frank wrote to the Chief to express her belief that she was not waiving any right to a hearing by participating in the conference. Despite some uncertainty about these unusual proceedings, discovery lumbered forward through the winter of 1983 and 1984. During that time, the Division steadfastly maintained its position that the Conference, while somewhat informal, could resolve the issue of jurisdiction if, when it was done, no relevant material facts remained in dispute. For example, in a letter from the Chief to Frank, copies of which were sent to all parties, the Chief expressed his opinion that the issue of jurisdiction would be resolved by undisputed facts adduced at the Conference:

I must repeat that in compliance with the decision of the Appellate Division, the Division on Civil Rights will conduct a fact finding conference to determine which material facts remain in dispute and to permit the parties to bring additional information to the attention of the Director.

If there are disputed issues of material fact it would then be appropriate to conduct a plenary hearing. See *Cunningham v. Department of Civil Service*, 6a N.J. 13, 19-24 (1975).

Given that the bulk of the facts in this case should be undisputed, I am optimistic that all of the material facts will be resolved at the fact finding conference.

However, participation in the conference will not prejudice your right to a hearing if appropriate.

See also letter of October 26, 1983 from the Director to Princeton's attorney. ("The Fact Finding Conference \* \* \* will be solely for the purpose of determining jurisdiction over the Clubs \* \* \*").

The Fact-Finding Conferences were held on March 12, and on April 3, 1984. At the outset Chief Sincaglia reminded the parties that the Conference would resolve the jurisdictional issue if no material fact disputes arose:

[T]he fact finding conference will make a preliminary determination as [sic] whether there are facts that are disputed, genuine issue of fact. To resolve the disputed issue, [sic] the parties will then be required to produce findings of fact and conclusions of law, and thereafter the director will issue a decision as to jurisdiction. *If there are no material facts and disputes at the end of the fact finding conference, \* \* \** you will issue proposed findings of fact and conclusions of law to me. Then the director will issue the findings as to jurisdiction. (emphasis added).

Thus, the parties were reminded several times that the Conference might prove conclusive. Moreover, the attorney for the Clubs explicitly acknowledged that she understood that the fact-finding conference was going to settle the issue of Division jurisdiction.

Uncertainty about the nature and effect of the Conference seems to have made the parties especially cautious. Far from lulling them into a false sense of security, this unfamiliar procedure heightened the parties' caution. The letters seeking

clarification from the Division indicate that the Clubs' and the University were acutely aware that the jurisdictional question might be resolved on the facts adduced at the Conference.

### C. Materiality of Facts

In analyzing the materiality of the facts, it is critical to understand that the Division rejected the theory that the Clubs themselves were places of accommodation. Instead, the Division premised its conclusion that the Clubs were not distinctly private on its finding that "the relationship between the Clubs and Princeton University is one of integral connection and mutual benefit." Jurisdiction over the Clubs is, essentially, based on jurisdiction over Princeton and supported by undisputed facts of the present day interdependence of the Clubs and Princeton. There no longer is any question that Princeton is a place of public accommodation under LAD. *Peper v. Trustees of Princeton University*, 77 N.J. 55, 67-68 (1978).

In reaching its determination that the Clubs lacked a distinctly private character because of their close connection with the University, the Division relied on three principles. First, claims that a club is distinctly private require close scrutiny by the Division and the courts. All facts must be carefully reviewed so that "[no] device, whether innocent or subtly purposeful, can be permitted to frustrate the legislative determination to prevent discrimination." *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 25, 34 (1966) (quoting *Jones v. Haridor Realty Corp.*, 37 N.J. 384, 396 (1962)).

Next, the Division relied on "a significant body of authority supporting the proposition that associations that ordinarily would be exempt from laws applying to public or commercial enterprises will lose that exemption if they alter their purely private character in some significant manner." (quoting *Franklin v. Order of United Commercial Travelers*, 590 F.Supp. 255, 260 (D. Mass. 1984)). The Division noted that one significant form of alteration is "a close association

with a non-exempt organization or institution." (citations omitted).

The third principle is that the Division must "deal with the substance, rather than the form of transactions, and not permit important legislative policies to be defeated by artifices affecting legal consequences of the existing situation." (quoting *United States v. Beach Associates, Inc.*, 286 F.2d 801, 807 (D.Md. 1968).

Applying these principles to the facts, the Division gave little weight to the Clubs' present financial and legal independence from the University. Neither did it rely heavily on evidence of historical connections between the Clubs and the University. Instead, the Division drew from undisputed facts demonstrating that "the University and the Clubs are in reality integrally connected." Specifically, the Division relied upon three factual conclusions in coming to its determination:

- (1) The Clubs are held out as part of a club system which serves Princeton students;
- (2) The Clubs draw their membership almost exclusively from Princeton University students; and
- (3) Princeton relies on the club system to feed a majority of its upperclass students.

Each of the three factual conclusions is based entirely upon undisputed facts adduced at the Fact-Finding Conference.

The Clubs agree that the Director's Finding of probable cause is based on undisputed facts. The Clubs' dissatisfaction with the Director's jurisdictional decision stems from the fact that the Director did not focus on the assiduously maintained legal separateness of the Clubs. Instead, the Division relied on the "gestalt" of the relationship between the University and the Clubs.

The finding of an integral and symbiotic relationship is based on the undisputed factual conclusions that the Clubs need the University and the University needs the Clubs, rather than on any particular act of control or integration.

Where a place of public accommodation and an organization that deems itself private share a symbiotic relationship, particularly where the allegedly "private" entity supplies an essential service which is not provided by the public accommodation, the servicing entity loses its private character and becomes subject to laws against discrimination. *Hebard v. Basking Ridge Volunteer Fire Department*, 164 N.J. Super. 77 (App. Div. 1978), *cert. den.* 81 N.J. 294 (1979) (volunteer fire department that refused to admit women had sufficient ties to municipality to make it subject to LAD); *Franklin v. Order of United Commercial Travelers*, 590 F.Supp. 255 (D. Mass. 1984) (fraternal benefit society is not exempt from State anti-discrimination law because its relationship to city's police department deprives it of private status); *Adams v. Miami Police Benevolent Ass'n*, 454 F.2d 1315 (5th Cir. 1972) *cert. den.*, 409 U.S. 843 (1972) (an association held subject to anti-discrimination law based on connection to city's police department, a non-exempt body). It would be disingenuous for the Clubs to assert that they could ever exist apart from Princeton University. The Clubs gather their membership from Princeton and, in turn, provide the service of feeding Princeton students. Because of this, the Clubs lack the distinctly private nature that would exempt them from LAD.

The Division's conclusion that the Clubs are not distinctly private is based on undisputed evidence. The eighteen disputed facts are immaterial to the Director's analysis because they pertain primarily to whether the Clubs are private or public places of accommodation in their own right. Other facts are immaterial because they demonstrate either formalistic historical connections or the technical, legalistic independence of the clubs, rather than the present-day functional interdependence of the Clubs and Princeton.

#### D. Eighteen Disputed Facts

We believe that the Division's legal reasoning was sound and that the Clubs are subject to LAD based on the undisputed evidence concerning their interdependent relationship.



Nonetheless, since the basis on which the Appellate Division remanded this case was that Chief Sincaglia improperly resolved 18 disputed stipulations, we will briefly analyze the disputed stipulations.

# 1. THE FIRST EIGHT STIPULATIONS PROPOSED BY FRANK

STIPULATION #3 The Division holds that Princeton University, a private, nonsectarian institution of higher education, is a place of public accommodation as defined by *N.J.S.A. 10:5-1, et seq.*

Determination of this fact requires legal analysis, not a trial type hearing. *Peper v. Trustees of Princeton University, supra*, 77 N.J. at 67-68 (Princeton is a place of public accommodation).

STIPULATION #11 The record herein does not support the proposal that the all-male clubs regularly advertise their parties at other schools. The record does indicate, however, that students from other schools are made aware of and attend functions at the all-male clubs.

As acknowledged by counsel for Tiger Inn at the Conference, this stipulation was irrelevant. The stipulation tends to show that the Clubs were, in some sense, open to the public. The Division's jurisdictional finding, however, was not based on a determination that the Clubs were places of public accommodation in their own right but that the Clubs are subject to the LAD because they are involved in a relationship of integral connection and mutual benefit with Princeton University.

Stipulations #14 through #18 relate to the historical connection between Princeton and the Clubs. Stipulation #14 relates to the origin of the Clubs. Stipulation #15 deals with the historical existence of University-faculty oversight of the Clubs' operations. Stipulation #16 relates to faculty participation in the selection of Club members at some time in the past. Stipulations #17 and #18 have to do with the disputed, but in any

case discontinued, involvement of the Dean's office in setting the dates for club membership selection. *See also* Stipulation #61, *infra*, at \_\_\_\_ (stating that historically, Princeton has had some degree of involvement in formulating rules for Bicker). Even though all of these stipulations go to the issue of a relationship between the Clubs and the University, none of them is material to the finding of jurisdiction. The "historical" component common to all of these stipulations makes them unnecessary to the Division's analysis. The Division's analysis goes exclusively to actual, i.e., current, not historical, indicia of interdependence. The existence or absence of formal connections between the University and the Clubs of the type demonstrated by the disputed stipulations 14-18 and 61 is thus immaterial to the analysis undertaken by the Division and, under the legal standards employed, no resolution of these disputes could affect the outcome of this litigation.

STIPULATION #19 provides that: The record herein indicates that an "interclub Agreement" exists between the "clubs" and Princeton University which at least in part intends to regulate the behavior of "club" members and their guests on the "clubs" premises.

The Inter-club Agreement is a document that was, at some point, proposed but never adopted as a way of setting standards for Club member conduct. This document was discussed at some length at the Conference. It is undisputed that although it was never adopted by the Clubs, the document somehow found its way into the possession of Princeton University authorities and was then excerpted in the Princeton University student handbook, *Rights Rules and Responsibilities* (1982 ed.). Counsel for Princeton admitted at the Conference that the inclusion of excerpts from the non-existent document was an error because no such agreement existed.

The following reference was made to the Inter-club Agreement in the Undisputed Facts section of the Division's Finding of Probable Cause:



The pamphlet *Rights, Rules and Responsibilities*, is published by Princeton University and sets forth Princeton University's disciplinary rules and procedures governing student behavior. The 1982 pamphlet included a specific section entitled "Conduct at Prospect Street Clubs" [*Rights, Rules and Responsibilities* at 26]. The regulations in that section are said to be based on the Interclub Agreement. The section presents excerpts from the terms of the Interclub Agreement, an agreement which establishes a cooperative arrangement for discipline of undergraduate students who violate standards of conduct. The "standards of behavior at individual clubs are to conform with established standards in the University as a whole. In particular, club members are to act with considerate regard for the rights, privileges, and sensibilities of others. It is expected that they will show due consideration for the property of their fellow members and guests, as well as for the property of the club itself. Physical violence, intimidation of others, or offensive and disorderly behavior will not be tolerated, in any club, or on the walks and streets outside the clubs" [*Rights, Rules and Responsibilities* at 26].

This description seems erroneously to accept the fact in dispute: the existence of an Inter-club agreement. The next question is what effect that erroneous statement of fact had on the finding of jurisdiction.

The Director listed three factors central to the finding that the Clubs and the University are integrally related, among them, that the Clubs "are held out'as part of a Club system which services Princeton University students." The facts cited to support that factual conclusion relate solely to the fact that the "University publications present the clubs as a dining alternative for upperclass students. \* \* \* [H]aving an eating club contract allows for an integration with the University dining facilities through the general meal exchange program." This factual conclusion therefore does not rely on facts tending to show that an Inter-club agreement regarding discipline was in effect.

The immateriality of the improper resolution of this disputed stipulation is reinforced by the reference made to it by the ALJ in his Initial Decision to grant a Partial Summary Decision on the issue of jurisdiction:

Respondents allege the existence of a dispute with respect to the following: an alleged Inter-Club Agreement, the nature of the 'hat bid' procedure, and the use of club facilities by members of the public. The Director, however, has made clear in her Finding of Probable Cause that these matters were not significant in reaching her decision. Similarly, for purposes of the pending Motion any such dispute is irrelevant.

In summary, we find that stipulation #19, although improperly and erroneously resolved and repeated in the statement of facts of the Finding of Probable Cause, formed no material part of the Director's ultimate determination that jurisdiction existed, based on the relationship between the Clubs and the University, existed.

## 2. THE NEXT TEN STIPULATIONS WERE PROPOSED BY THE CLUBS

STIPULATION #58 The record herein indicates that while each "club" devises its own rules for Bicker, these rules are influenced by Princeton University's rules and regulations.

The Finding of Probable Cause does not rely on this stipulation. The stipulation relates to the type of formalistic ties that formed no part of the finding of jurisdiction. The finding on jurisdiction is based on the symbiotic relationship that exists between the Clubs and the University. The University provides the students; the Clubs feed them. Formalistic discussion of rule derivations is immaterial to this analysis.

As previously mentioned, Stipulation #61 is a historical fact, immaterial to the finding of jurisdiction.

STIPULATION #110 The record herein indicates that Princeton University assumes some oversight responsibilities with respect to the conduct of the members of the all-male clubs.

The discussion of this stipulation at the Conference was minimal. The stipulation is immaterial to the decision on jurisdiction, which was based on the functional interdependence of the Clubs and the University rather than questions of discipline. Moreover, the stipulation is correct and supported by other stipulations. During the discussion of the Inter-Club Agreement, counsel for Tiger agreed that a student who violated the Code of Conduct of Princeton would be subject to discipline by a joint committee, which includes the Dean of Student Affairs, no matter where the violation occurred. According to stipulation #22, to which there is no opposition by the Clubs, Club officers have been disciplined by the University for Club members' behavior, although it is no longer University policy to do so. According to undisputed stipulation #133, Princeton disciplines students involved in off-campus altercations. Presumably, this includes altercations that occur at Clubs.

STIPULATION #111 The record herein indicates that the activities of the all-male clubs are conducted for the benefit of their members, not the public.

The only dispute over this stipulation was Frank's objection to the use of the word "public." The stipulation, as resolved, rejects Frank's theory and is generally favorable to the Clubs.

STIPULATION #112 The record herein indicates that the all-male clubs do not always limit the use of the facilities and services of their clubs to their members in good standing and their guests.

This stipulation appears to be true. There was undisputed testimony by Gordon K. Harrison, Club Manager for several clubs, including Tiger, that during the fall term, "sopho-

mores are able to visit clubs to sample the meals . . .'' when deciding what clubs to join even though they are not personally invited by a member. This indicates that the clubs do not always limit the use of their facilities to members and their guests. Beyond the veracity of this stipulation, however, is the issue of whether it is relevant.

This stipulation goes to the non-essential issue of whether the Clubs are places of public accommodation in their own right, and is irrelevant to the crucial determination that the Clubs are subject to the jurisdiction of the Division on Civil Rights because they had altered their distinctly private nature by means of their connection with Princeton University.

Stipulations 118, 121, 122 and 127 were all resolved in the Club's favor. Disputed Stipulation is 171 irrelevant to the type of analysis employed by the Division and also is not really disputed.

**STIPULATION #171** The record herein indicates that when Princeton snowplows travel between University facilities located at the opposite ends of Prospect Avenue, they often clear the public right-of-way (sidewalks) in front of Ivy, Cottage, and Tiger Inn without the all-male clubs' permission.

The only dispute to which this stipulation seems to relate is whether the Clubs had ever requested snow-plowing, or the degree of relationship between the Clubs and the University that is demonstrated by the plowing. In fact, there was documentary evidence indicating that a decision to plow in front of the Clubs was made by the University, specifically to help the Clubs during times of financial hardship. In addition, stipulation #159, *proposed* by Tiger Inn and *accepted* by Frank, acknowledges that snow-plowing on Club property occurs and is not paid for by Tiger Inn. If the dispute over this stipulation was improperly resolved, it was resolved in the Clubs' favor in a way that accorded precisely with the testimony of the Club managers, called as witnesses for the Clubs. Moreover, this stipulation has nothing to do with the analysis employed by the Directors in its Finding on jurisdiction.

The Clubs and Princeton, which is undisputably subject to LAD, have an integral relationship of mutual benefit. The relationship between the Clubs and Princeton can be derived entirely from the undisputed facts regarding the present functional interdependence between the Clubs and the University. There are no disputed facts material to the jurisdictional issue. Therefore, no plenary hearing was necessary before the Division properly asserted jurisdiction over the Clubs.

We also find that the undisputed facts establish that the Clubs and Princeton have an interdependent relationship that deprives the Clubs of private status and makes them subject to the Division's jurisdiction.

Gender discrimination is contrary to the legislative policy of the State of New Jersey. "The eradication of 'the cancer of discrimination' has long been one of our State's highest priorities." *Dixon v. Rutgers, The State University of N.J.*, 110 N.J. 432, 451 (1988), quoting from *Fuchilla v. Layman*, 109 N.J. 319, 334 (1988). See also *Peper v. Princeton*, *supra*, 77 N.J. at 80. The Legislature enacted LAD to reflect the belief that "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions of a free democratic state." N.J.S.A. 10:5-3. The elimination of discrimination in educational institutions is particularly critical. *Dixon v. Rutgers, The State University of N.J.*, *supra*, 110 N.J. at 452-53. The intent of the legislature to eliminate discrimination in educational institutions is evidenced by the designation in N.J.S.A. 10:5-5(1), as a "place of accommodation," of any "college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey." See also *Hebard v. Basking Ridge Fire Company*, *supra*, 164 N.J. Super. 77; *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 25 (1966); *Nat. Org. for Women v. Little League Baseball*, 127 N.J. Super. 522 (App. Div. 1974).

The Clubs have fiercely contested the threshold issue of jurisdiction because, once jurisdiction is established, there is

no question that the Clubs discriminated against women. It is undisputed that the Clubs had a general policy that excluded females from consideration as members. It is also undisputed that the Clubs applied this policy to Frank when she attempted to bicker at the clubs. That policy constituted discrimination in violation of LAD. On the basis of the facts in this record, we agree with the Division that the Clubs cannot sever their ties to the University or remove themselves from the jurisdiction of the Division. Instead, the Clubs must obey this State's substantive legal proscriptions against discrimination and discontinue their practice of excluding women purely on the basis of gender.

We reverse the Appellate Division and reinstate the Order of the Division on Civil Rights dated May 26, 1987.

Chief Justice Wilentz and Justices Handler, Pollock, and Stein join in this opinion. Justices Clifford and O'Hern have filed a separate concurring opinion.

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## SUPREME COURT OF NEW JERSEY

A-125 September Term 1989

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SALLY FRANK,

*Complainant-Appellant,*

—v.—

IVY CLUB, TIGER INN, and TRUSTEES OF  
PRINCETON UNIVERSITY,*Respondents-Respondents,*

—and—

UNIVERSITY COTTAGE CLUB,

*Respondent.*

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CLIFFORD and O'HERN, JJ., *concurring in judgment.*

We agree with the Court's ultimate conclusions that (1) there was no necessity for the Division on Civil Rights to have conducted a plenary hearing before exercising jurisdiction over the all-male eating clubs, (2) the eating clubs' special relationship with Princeton University deprived those clubs of exempt status as "distinctly private" social organizations under this State's statutory law guaranteeing civil rights, *N.J.S.A. 10:5-1 to -42*, and (3) the clubs' by-laws and policies against admission of women violated this State's substantive law. We therefore concur in the judgment.



**Opinion of the Superior Court of New Jersey  
Appellate Division  
Dated October 4, 1988**

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
A-5304-86T5 A-6058-86T5**

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SALLY FRANK,

*Complainant-Respondent,*

—v.—

IVY CLUB and TIGER INN,

*Respondents-Appellants,*

—and—

TRUSTEES OF PRINCETON UNIVERSITY,

*Respondent,*

—and—

UNIVERSITY COTTAGE CLUB,

*Defendant.*

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Argued February 1, 1988. Decided October 4, 1988.

Before Judges J.H. Coleman, Havey and Stern,

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On appeal from New Jersey Department of Law and Public Safety, Division on Civil Rights.

[Appearances Omitted]

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The opinion of the court was delivered by  
COLEMAN, J.H., P.J.A.D.

The crucial issue raised in these sex based discrimination appeals is whether the Division on Civil Rights (Division) followed the appropriate procedure before concluding that eating clubs located on Prospect Avenue, in Princeton, New Jersey, are subject to the public accommodations provision of New Jersey Law Against Discrimination (*N.J.S.A.* 10:5-12f). We conclude it did not. We therefore reverse in part and remand for new proceedings.

### BACKGROUND

The following background is essential to an understanding of the case. Princeton University (Princeton), located in Princeton, New Jersey, is a private, nonsectarian institution of higher education, founded in 1746. Princeton admitted only male students as undergraduates until 1969. Upperclassmen social life on Princeton's campus revolve around thirteen eating clubs which Princeton depends on to feed a large percentage of its upperclass students. Ivy Club, University Cottage Club and The Tiger Inn are among the thirteen. This case involves complainant's attempt to join one of these all male eating clubs.

Between 1803 and 1843 Princeton required all of its undergraduate students to eat at the University Commons. Beginning in 1843, however, students were permitted to eat off campus. Princeton's eating facility burned down in 1856. After the fire, all of the students ate their meals in boarding houses not affiliated with Princeton until 1906-1907 when Princeton reestablished eating commons for freshmen and sophomores. Beginning in the mid-1800's several groups of Princeton students formed "select associations" to provide off campus boarding and lodging. The associations were careful not to become secret societies, which were not permitted at Princeton. The Ivy Club, The University Cottage Club

and The Tiger Inn were established as associations which became permanent clubs.

The clubs offer social, recreational and dining activities to Princeton undergraduates. Eight of the thirteen clubs are nonselective, choosing their members by a lottery if demand is too great to accommodate everyone. All of the nonselective clubs are coeducational. Five clubs are selective, choosing their members through a system of interviews known as "bicker." Ivy, Tiger Inn and The University Cottage Club are selective. When the litigation was commenced, these were the only remaining all male clubs. All three clubs are located off campus on Prospect Avenue in separate buildings which they own. They were chartered between 1883 and 1892 pursuant to "an Act to Incorporate Societies or Clubs for Social, Intellectual and Recreative Purposes." L. 1878, c. CXI, p. 175. The clubs are neither owned nor operated by Princeton.

Sally Frank (Frank) enrolled as an undergraduate at Princeton in the fall of 1976. During her junior and senior years (1978-1979 respectively) she attempted to join one of the three all male clubs. Although Frank dined at the Tiger Inn and Ivy Club on a number of occasions, neither of the three all male clubs offered her membership. Frank graduated in 1980. Because the issues raised are of substantial public importance, we concluded in a prior appeal (on August 1, 1983) that despite her graduation, the issues should be resolved. See *Busik v. Levine*, 63 N.J. 351, 364 (1973), app. dis. 414 U.S. 1106 (1973).

## PROCEDURAL HISTORY

This case has a tortuously complex and protracted procedural history. The appellate record consists of eight volumes of transcripts consisting of 1,527 pages and over 6,000 pages of documents. Frank filed a complaint with the Division pursuant to N.J.S.A. 10:5-13 alleging unlawful discrimination based on sex by Princeton, Ivy Club, University Cottage Club and Tiger Inn contrary to N.J.S.A. 10:5-12f. In a letter dated June 7, 1979, the Division advised Frank that after

reviewing her complaint the Division "has decided that the N.J. Law Against Discrimination exempts the aforesaid clubs because they are distinctly private, as provided for in *N.J.S.A. 10:5-5(1)*. Accordingly, the Division will not process this complaint." The Division also found no probable cause to credit the allegation made against Princeton. A similar complaint against Princeton was filed with the Department of Health, Education and Welfare, The Office for Civil Rights, alleging a violation of Title IX of the Education Amendments of 1972, 20 *U.S.C. § 1681 et seq.* The Office for Civil Rights terminated its investigation in April 1980 when it concluded the "eating clubs are private social organizations whose membership practices are exempt from the requirements of Title IX." That office dismissed the complaint after finding "no violation of Title IX on the part of Princeton University against Ms. Sally Frank."

After extensive discussions, the Division eventually agreed that it would process a second complaint if filed. On November 26, 1979, Frank filed another complaint with the Division against the same parties. This complaint alleged the clubs were "public accommodations" because they functioned "as arms for Princeton University." A verified complaint was issued by the Division on December 19, 1979. On January 28, 1980, the three clubs filed answers in which they denied they were places of public accommodation affiliated with Princeton University. The clubs also asserted their members' rights to freedom of association under the First Amendment would be violated if the relief sought by Frank were granted. Similarly, Princeton filed an answer denying that it was a place of public accommodation and that it had sanctioned or committed unlawful acts of discrimination.

The Division conducted a preliminary investigation pursuant to *N.J.S.A. 10:5-14* to determine whether it had jurisdiction and whether "probable cause exists for crediting the allegations of the complaint. . . ." Without conducting any type of a hearing or holding a fact-finding conference (see *N.J.A.C. 13:4-2.3*), the Division dismissed the second complaint on December 9, 1981. Frank was not afforded any opportunity to participate in the investigation. The Division

made no findings of fact. The Division concluded "the Clubs are by their nature distinctly private and as such these responding Clubs are excluded from the jurisdiction of the Division on Civil Rights pursuant to *N.J.S.A.* 10:5-5(1)." The Division also found no probable cause to support the allegations against Princeton.

Frank filed a notice of appeal from the dismissal of the second complaint. On August 1, 1983 a different part of this court issued its decision. Without reaching the merits of the issues raised by the complaint, we reversed the dismissal of the complaint on procedural grounds: the lack of findings of fact and the lack of a hearing. We concluded that a hearing and factual findings were essential requirements before determining whether the Division has jurisdiction because "a denial of jurisdiction is as significant to a complainant as would be the ultimate determination regarding discrimination." We reversed the dismissal of the complaint and remanded the case to the Division to conduct "a more formal inquiry as to the factual issues as they relate to jurisdiction of the Division," probable cause and the substantive issues presented. The Division was directed to make adequate findings of fact and conclusions of law.

Before resuming its investigation pursuant to our mandate, the Division filed a motion on August 11, 1983 for reconsideration of our decision. The purpose of the motion was to seek clarification as to the kind of hearing required by our decision. The motion was denied on September 6, 1983 without further direction.

By letter dated October 5, 1983 the Division notified the parties that a fact-finding conference would be held pursuant to *N.J.A.C.* 13:4-2.3 "to make a preliminary determination as to whether there are material facts in dispute. In the event that there exists genuine issues of material fact, the Division will conduct a public hearing to resolve the disputed issues."

The parties were directed to meet with the Division's Chief of the Enforcement Bureau, James Sincaglia (Sincaglia), on November 16, 1983. The parties were told to be prepared to discuss only the jurisdictional aspects of the case at the fact-



finding conference. They were also advised to provide a reiteration of all documentation previously submitted to the Division and "any other materials which you deem relevant and which have not been previously submitted." Interrogatories were exchanged between the parties. On December 19, 1983 the parties were again assured that if the fact-finding conference did not resolve all of the facts, "it would then be appropriate to conduct a plenary hearing. See *Cunningham v. Department of Civil Service*, 69 N.J. 13, 19-24 (1975)."

On March 12 and April 3, 1984 fact-finding conferences were held by Sincaglia. Frank filed an amended verified complaint on March 12, 1984 in which she made the additional allegations that the clubs individually were public accommodations apart from any relationship with Princeton. The parties denied these new allegations.

On April 18, 1984 the parties were notified by the Division that the record would close on April 30, 1984. The parties were advised to review their files and to submit any additional documentation they desired. The Division granted the parties an extension of the deadline for submitting materials to permit additional information concerning "the number of hat bids<sup>1</sup> extended during the years that Sally Frank was at Princeton as well as the number of persons who bickered and were extended bids in recent years." By letter dated April 30, 1984, counsel for the Ivy Club submitted additional information.

On May 31, 1984, Sincaglia notified the parties of the fact-finder's Rulings and the stipulations accepted. The findings were divided into five categories: (1) stipulations proposed by the complainant and accepted by the respondents; (2) stipulations proposed by the respondents and accepted by the complainant; (3) the Division fact-finder's Ruling on the stipulations that were proposed by the complainant and not accepted by the respondents; (4) the Division fact-finder's

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1 The hat bid procedure refers to the offering of a bid to a man who went through the application process for the selective eating clubs but was not offered an invitation to join any club. The club selected to offer the hat bid to the unchosen applicant was picked by the roll of a dice.

ruling on the stipulations that were proposed by the respondents and not accepted by the complainant; and (5) stipulations that would require conclusions that would be made by the Director upon review of the entire record which were not accepted or rejected by the Division's fact-finder.

Following the transfer of the entire record to the Director, the parties were given 45 days "to submit proposed findings of fact and conclusions of law on the entire record."

On May 14, 1985 the Director issued a Finding of Probable Cause. The Director found the Division had jurisdiction over the three eating clubs and that probable cause to believe sex discrimination existed. Three weeks after the Finding of Probable Cause was issued (June 7, 1985), Frank requested the case be transferred to the Office of Administrative Law (OAL) as a contested case. See *N.J.S.A.* 10:5-13 and *N.J.A.C.* 13:4-12.1(c) and (d). In compliance with this request, the case was transferred to the OAL on July 18, 1985 or August 20, 1985, the exact date is not made clear by the record.

The case was assigned to an Administrative Law Judge (ALJ) who scheduled a prehearing conference for September 26, 1985 to identify the issues and the nature of the proceeding. A "Prehearing Order" was issued by the ALJ on October 1, 1985. That order provided, among other things, that "Complainant is considering moving for summary judgment on the issue of discrimination and liability. If complainant does make such a motion, it is to be filed and served in accordance with the Uniform Administrative Procedures Rules (*N.J.S.A.* [sic] [*N.J.A.C.*] 1:1-1 *et seq.*) on or before October 17, 1985."

October 16, 1985, Frank filed a motion pursuant to *N.J.A.C.* 1:1-12.5 *et seq.* for partial summary decision on the issue of jurisdiction. The Ivy Club and Tiger Inn filed briefs in opposition to the motion. On December 12, 1985 the ALJ issued his Initial Decision on Partial Summary Decision. He granted the motion finding that the Director's May 14, 1985 finding that the Division had jurisdiction should be considered final. The ALJ also found there were no material facts in dispute and that the facts which the clubs alleged were dis-



puted were found to be immaterial to the May 14, 1985 decision of the Director. On February 16, 1986, the Director issued an Order of Partial Summary Decision on Jurisdiction which adopted the recommendations of the ALJ.

The University Cottage Club settled with Frank on February 26, 1986. As part of the settlement, women are permitted to seek membership in the club and the club paid Frank \$20,000. See *Tiger Inn v. Edwards*, 636 F. Supp. 787, 789 n.1 (D.N.J. 1986) (in which Tiger Inn and Ivy Club sought to enjoin the Division from hearing the case). Consequently, The University Cottage Club has not participated in these appeals as the claims against it were dismissed as part of the settlement.

After the ALJ's ruling of December 12, 1985, Frank filed a Motion for Summary Decision against the clubs and Princeton on the issue of liability. The ALJ issued an Initial Decision on June 16, 1986, granting the Motion for Partial Summary Decision. He ruled that liability existed with regard to the two clubs, but not against Princeton, stating that more information was necessary to address the issue of what constituted "aiding and abetting" discrimination by Princeton.

On July 26, 1986, Frank and Princeton entered into a Stipulation and Order of Partial Settlement. Princeton continued to participate in the proceedings because of the potential involvement it would have in whatever remedies were ultimately ordered by the Division.

On July 28, 1986, the Director adopted the ALJ's Initial Decision of Partial Summary Decision on liability respecting the two clubs. The Director found the claims against Princeton were moot based on the settlement agreement between Frank and Princeton. There has been no appeal from that determination. The Order remanded the matter back to the OAL for further proceedings on remedies to be afforded Frank. Following that remand, the ALJ conducted hearings for six days between July 29 and August 6, 1986, during which sworn testimony subject to cross-examination and additional documents were admitted as evidence.

On January 29, 1987, the ALJ issued his Initial Decision on the issues of damages and remedies. In his decision, he afforded the following remedies:

- (a) that Ms. Frank be awarded \$2,500 in compensatory damages by the two Clubs;
- (b) that Ms. Frank not be awarded membership in either club;
- (c) that the two Clubs should sever certain ties to Princeton in order to attain 'distinctly private' status under *N.J.S.A. 10:5-5(L)*;
- (d) that Princeton should avoid reference to the two Clubs as being affiliated or connected with the University in all future publications.

On May 26, 1987, the Director issued the Final Administrative Decision and Order. The Initial Decision of the ALJ was adopted in part and modified in part: (a) the compensatory damages were increased to \$5,000; (b) the two Clubs were ordered to admit women, but not Frank, and (c) the two Clubs were not permitted to sever ties with Princeton.

The Ivy Club filed an appeal on July 10, 1987 and was assigned Docket No. A-5304-86T5. The Tiger Inn filed its appeal on the same day and was assigned Docket No. A-6058-86T5. The Director granted a stay of her final decision directing the Clubs to admit women. The damages awarded have been paid and are held in escrow by the Division. The appeals have been consolidated.

#### OBJECTIVE OF LAW AGAINST DISCRIMINATION

Eradication of the "cancer of discrimination" has long been one of this State's highest priorities. *Fuchilla v. Layman*, 109 N.J. 319, 334 (1988), petition for cert. filed, *sub nom.*, *University of Medicine and Dentistry of N.J. v. Fuchilla*, 57 U.S.L.W. 3001 (1988). Discrimination based on sex "is peculiarly repugnant in a society which prides itself

on judging each individual by his or her merits." *Peper v. Princeton University Board of Trustees*, 77 N.J. 55, 80 (1978). Generally, it has been recognized that the Division has expertise "in recognizing acts of unlawful discrimination, no matter how subtle they may be." *Clowes v. Terminix Intern., Inc.*, 109 N.J. 575, 588 (1988).

N.J.S.A. 10:5-4 declares as a civil right the opportunity of all persons to obtain and enjoy all the rights and privileges of a "public accommodation." Princeton is a public accommodation within the meaning of the Law Against Discrimination. N.J.S.A. 10:5-5(1); N.J.S.A. 10:5-12f; *Dixon v. Rutgers, the State University of N.J.*, 110 N.J. 432, 452 (1988); *Peper, supra*, 77 N.J. at 67. The ban against invidious discrimination by a public accommodation relates to a facility used by or maintained for the use of the general public. *Ibid.*

Despite Ivy's and the Tiger Inn's contentions otherwise, there is a developing body of law holding that the Law Against Discrimination also covers private establishments which have altered their distinctly private character through close association with a public accommodation. See *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 25 (1966); *Hebard v. Basking Ridge Fire Company No. 1*, 164 N.J. Super. 77 (App. Div. 1987), app. dis. 81 N.J. 294 (1979); *Nat. Org. for Women v. Little League Baseball*, 127 N.J. Super. 522 (App. Div. 1974), aff'd 67 N.J. 320 (1974). See also *Bob Jones University v. Johnson*, 396 F.Supp. 597, 602-604 (S.C.1974); *Pinkney v. Mallory*, 241 F.Supp. 943 (N.D.Fla. 1965).

Princeton as a public accommodation for higher education performs a significant social function by promoting "the pursuit of truth, the discovery of new knowledge through scholarship and research, the teaching and general development for students, and the transmission of knowledge and learning to society at large." *State v. Schmid*, 84 N.J. 535, 564 (1980), app. dis. 455 U.S. 100 (1982) (quoting from Princeton University Regulations passed by the Council of the Princeton University Community, May 1975, as amended 1976). Hence, it is important to eradicate sex discrimination at

Princeton and private establishments associated with Princeton which have altered their distinctly private character through close association with the University. In the process, a balance must be struck between the club members' associational rights, and the State's compelling interest in eliminating invidious sex discrimination. See *New York State Club Assoc. v. New York City*, 487 U.S. —, 108 S.Ct. 225, 101 L.Ed. 2d 1 (1988); *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. —, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987). We hasten to add that this decision does not address the relative merits of the allegation of sex discrimination.

### ADEQUACY OF HEARING

In its appeal, Ivy contends "the Division denied Ivy the [plenary] hearing to which it was entitled pursuant to the Appellate remand, State law and general principles of due process and fair play." It argues that as a party to a contested case, it was entitled to a hearing before an ALJ on the issue of jurisdiction once the matter became a contested case. It argues further that the fact-finding conference should have been conducted by the Director, not her designee.

The Tiger Inn argues it "was not given the hearing ordered by this Court and required by law." This argument is based on its assertion that the "Appellate Division ordered the Division on Civil Rights to conduct a plenary hearing." It also contends that a plenary hearing was required by the Administrative Procedure Act, *N.J.S.A.* 52:14B-9(c), and that witnesses who testified were required by *N.J.S.A.* 10:5-16 to be under oath. Finally, it argues that "disputed issues were to be resolved at a hearing but were not" and that this denied it procedural due process. In essence, the clubs argue they were entitled to an evidentiary hearing under the Administrative Procedure Act and based on principles of fair play and administrative due process.

Princeton takes no position on the issues of jurisdiction, the adequacy of the hearing or the liability of the clubs. The Division contends no plenary hearing was required because no material facts were in dispute. Frank takes the position

that the method used by the Director to decide the issue of jurisdiction and liability was appropriate.

The procedural requirement of due process necessarily varies from case to case. *Lopez v N.J. Bell Telephone Co.*, 51 N.J. 362, 373 (1951); *Avant Industries Ltd. v. Keller*, 127 N.J. Super. 550, 553 (App. Div. 1974). The precise requirements in a given case depend on the interest of the parties under the controlling circumstances. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Matter of Kimber Petroleum Corp.*, 110 N.J. 69, 100 (1988) (Wilentz, C.J. dissenting). In a contested case involving disputed facts, however, an evidentiary hearing and findings of fact are mandated by both N.J.S.A. 52:14B-9 and administrative due process. *Bally Mfg. Corp. v. N.J. Casino Control Comm'n*, 85 N.J. 325, 333 (1981), app. dis. 454 U.S. 804 (1981); *Cunningham v. Dept. of Civil Service*, 69 N.J. 13, 24-25 (1975). The Court in *Bally* defined an evidentiary hearing as a trial-type hearing which is required "where the proposed administrative action is based on disputed adjudicatory facts." *Bally, supra*, 85 N.J. at 334. It is not the vital interest of a party involved in an administrative proceeding which triggers the need for an evidentiary hearing. Rather, it is the existence of disputed adjudicative facts which could affect the ultimate decision on the merits. Adjudicative facts are those which answer the questions who did what, where, when, how, why, with what motive or intent. 2 *Davis, Administrative Law Treatise*, §12:1 at 406; §12:2 at 409-410 and §12:3 at 413 (2d ed. 1979).

The Law Against Discrimination is silent as to the precise procedure to be employed to determine probable cause required by N.J.S.A. 10:5-14. The regulations promulgated for the Division (N.J.A.C. 13:4-1.1 *et seq.*), however, state they shall govern all proceedings in the Division. Generally, the head of an agency has the sole power to decide how best to proceed in a given case, depending upon the nature of the claim presented. *In re Uniform Adm'n Procedure Rules* 90 N.J. 85, 104 (1982).

We reject appellants' contention that before the case was transferred to the OAL they had a right to a hearing before



an ALJ to determine the threshold question of probable cause required by *N.J.S.A.* 10:5-14. The OAL conducts hearings in contested cases, *N.J.S.A.* 52:14B-9(c), and only then upon request. The head of an agency has the right not to transfer a contested case to the OAL. The agency head has the discretionary authority to both hear the contested matter and to render a determination. *In re Uniform Adm'n Procedure Rules*, *supra*, 90 *N.J.* at 90-91, 104 n.8 (1982); *Unemployed-Employed Council of N.J., Inc. v. Horn*, 85 *N.J.* 646, 654 (1980). See also *N.J.S.A.* 52:14F-8(b). But when the agency head decides to both hear the case and render an adjudication on the merits, the agency head must personally and directly conduct the hearing and render the decision. *Unemployed-Employed Council of N.J. Inc. v. Horn*, *supra*, 85 *N.J.* at 657-658; *N.J.S.A.* 52:14F-8(b). As part of a culling-out process, the agency head is permitted by *N.J.S.A.* 52:14F-7 to first determine whether the case is contested and, "if so, whether the case should be sent to the OAL for an adjudicatory hearing to be conducted by an administrative law judge." *In re Uniform Adm'n Procedure Rules*, *supra*, 90 *N.J.* at 105.

We also reject Ivy's contention that the fact-finding conference should have been conducted by the Director and not by Sincaglia. Sincaglia was Chief of the Enforcement Bureau. *N.J.A.C.* 13:4-1.4 states a Bureau Chief "shall exercise such powers of the Division as the Director may from time to time delegate to him or her." Sincaglia was designated by the Director to conduct the fact-finding conference which was proper for the investigative phase of the case. He could not, however, conduct an adjudicatory hearing without violating *N.J.S.A.* 52:14F-8(b).

Even though the head of the Division is empowered to decide both probable cause and the ultimate merits (final adjudication), they involve distinctly different determinations and different rules apply. The probable cause determination implicates the administrative mechanisms employed to investigate the complaint as mandated by *N.J.S.A.* 10:5-14. This investigation is a culling-out process whereby the Legislature directed the Division to make an initial determination of



whether probable cause exists to believe a complainant has been discriminated against in violation of *N.J.S.A. 10:5-1 et seq.*

The Law Against Discrimination does not define probable cause. But we have heretofore defined it to mean a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious man in the belief that the law is being violated." *Sprague v. Glassboro State College*, 161 *N.J. Super.* 218, 225 (App. Div. 1978) (quoting *People v. Marshall*, 13 *N.Y.2d* 28, 34, 241 *N.Y.S.2d* 417, 421, 191 *N.E.2d* 798, 801 (Ct.App. 1963)).

Much the same way as in the administration of criminal justice (see *R. 3:4-3* and probable cause for Fourth Amendment purposes, *State v. Novembrino*, 105 *N.J.* 95, 105-122 (1987)) a proceeding to determine the existence of probable cause is not an adjudication on the merits. Rather, it is an initial threshold procedure to determine whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits. The quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits. As the name implies, probable cause is concerned with probabilities. When deciding probable cause, the Director was not permitted to resolve disputed facts. The Director was not concerned with whether the information collected during the investigation was true or false—only whether it was reasonable to accept it as true and if so whether it justified consideration on the merits. A common sense, practical and nontechnical standard is required for the probable cause determination.

Following our August 1, 1983 remand decision, the Division undertook to test its jurisdiction and probable cause required by *N.J.S.A. 10:5-14* by employing the fact-finding conference method outlined in *N.J.A.C. 13:4-2.3*. This regulation in pertinent part provides:

(a) Fact-finding, as part of an investigation in a discrimination complaint, is subject to the following:

1. As part of its investigation, the Division may convene a fact-finding conference for the purpose of obtaining evidence, identifying the issues in dispute, ascertaining the positions of the parties and exploring the possibility of settlements. *The fact-finding conference is not an adjudication of the merits of the complaint.*

2. The Division shall provide the parties with written notice of the conference. Said notice shall identify the individuals requested to attend on behalf of each party, and any documents which any party is requested to provide within the specified time frame.

(b) The conference shall be conducted as follows:

1. The Division employee acting as fact-finder shall conduct and control the proceedings.

2. Upon prior notice to the Division, the parties may bring witnesses to the conference in addition to those whose attendance may be specifically requested by the Division, but the fact-finder shall have discretion over which witnesses shall be heard and the order in which they are heard. The fact-finder may exclude any witness or other person from the conference not limited to those who are not giving evidence, except that one representative of each party and counsel shall be permitted to remain throughout.

3. The Division may request the parties to provide affidavits from witnesses who appear at the fact-finding conference.

4. A party may be accompanied at a fact-finding conference by his/her attorney or another representative, and by a translator, if necessary.

5. An attorney for a party who has not previously entered his or her appearance shall do so at the outset of the conference.

6. *Because the fact-finding conference is a means of investigation and not a hearing on the merits of a case,*

the parties shall not be entitled to cross-examine witnesses. All questioning shall be conducted by the fact-finder, unless in his or her discretion the fact-finder permits questions to be asked by other persons present at the conference.

7. During the conference, the fact-finder may allow a recess to permit the parties to discuss settlement.

(c) A record of the fact-finder conference shall be discovered as follows:

1. Following a Finding of Probable Cause or No Probable Cause, any reports of factual statements made at the fact-finding conference shall be discoverable by the parties.

2. Any records made of settlement discussions during the conference shall not be discoverable. [Emphasis added].

The Director never intended to equate the fact-finding conference to an adjudicatory hearing. She said as much in the Division's motion for a clarification of our August 1, 1983 decision when she advised the court and counsel that the fact-finding conference was part of the Division's initial investigation and if material facts were disputed "it would be appropriate to hold a plenary contested case hearing to determine jurisdiction." Also, in the Director's October 5, 1983 letter to counsel for the parties, she made clear that the purpose of the fact-finding conference was "to make a preliminary determination as to whether there are material facts in dispute." The parties were assured that if material facts were disputed, "the Division will conduct a public hearing to resolve the disputed issues."

Furthermore, in a letter dated October 26, 1983 and addressed to Frank, the Director stated that if the fact-finding conference did not resolve the issue of jurisdiction, "I will again review the matter for possible submission to a hearing." In addition, Sincaglia acknowledged that a plenary hearing would be conducted if material facts were in

dispute. On January 3, 1984 Sincaglia advised counsel for the parties:

regarding the exact nature of the Fact Finding Conference please note the following. The Fact Finding Conference is not an adjudication of the merits of the Complaint but a means of investigation. . . . Frank is not expected to prove the allegations of her Complaint, nor are Respondents required to prepare a defense. Rather, the parties should be prepared to attempt to resolve any remaining disputed facts and to present additional relevant evidence to the Fact Finder.

Notwithstanding these assurances that a hearing would be conducted, Sincaglia submitted his fact-finder's report on May 31, 1984 which contained stipulations and factual findings. He reported 39 stipulations submitted by Frank which the parties accepted as proposed or as modified and revised by the parties. Similarly, 191 of the respondents'-appellants' proposed stipulations were accepted. Eight stipulations proposed by Frank were not accepted by the respondents (Appendix A) and ten stipulations proposed by respondents were not accepted by Frank (Appendix C). Sincaglia made tentative findings of fact respecting these 18 proposed stipulations. He advised counsel for the parties "that sufficient evidence existed in the record to issue Findings on the disputed stipulations. Therefore no material facts remain in dispute."

Each attorney was permitted to respond to Sincaglia's report. After considering suggested revisions and objections to the report in part based on the lack of a hearing, Sincaglia issued the final stipulations the parties accepted and his final rulings on the disputed stipulations of fact. See Appendix B and D. In an undated letter to counsel for the parties, Sincaglia stated:

There was ample documentary evidence and testimony submitted by the parties to enable the Fact Finder to rule on the disputed stipulations of fact. Likewise, a review of the stipulations, rulings and information collected during the investigation indicates that the parties

essentially agree on the facts but disagree on their legal significance. Therefore, no material facts remain in dispute, all issues have been investigated as completely as possible and no proof has been presented to conclude otherwise. Thus, there is no need to conduct a hearing in this matter.

All parties have forty-five days from their receipt of this letter to submit proposed findings of fact and conclusions of law on the entire record. Please refer to the record where appropriate. The parties will then have an additional thirty days to submit briefs in reply. At that time the Director will consider all of the evidence, stipulations and proposed findings and she will issue within forty-five days findings of fact and conclusions of law on the issue of jurisdiction. Further proceedings will depend on the outcome of the Director's decision.

After review of the fact-finder's report, the Director made the determination that Princeton is a public accommodation within the meaning of *N.J.S.A. 10:5-5(1)*. The Director also made the determination that the Division has jurisdiction over the Ivy Club and the Tiger Inn because the clubs have significantly altered their purely private character through their close association with Princeton, a public accommodation, thereby depriving the clubs of the exemption for a "bona fide club, . . . which is in its nature distinctly private." *N.J.S.A. 10:5-5(1)*. Finally, the Director made the determination that probable cause existed to believe the clubs discriminated against Frank on the basis of sex and that Princeton had aided and abetted in the discrimination.

Following the jurisdictional and probable cause threshold determinations which were made pursuant to *N.J.S.A. 10:5-14*, the case was transferred to the OAL to conduct a hearing as a contested case. See *N.J.S.A. 10:5-13* and *N.J.A.C. 13:4-12.1(c)* and (d). Frank filed motions for partial summary decision on the issues of jurisdiction and discrimination. The summary decision rule is *N.J.A.C. 1:1-12.5*, which provides in pertinent part:



(a) At any time after a case is determined to be contested, a party may move for summary decision upon all or any of the substantive issues therein.

(b) The motion for summary decision shall be served with briefs and with or without supporting affidavits. The decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.

The validity of the rule permitting summary decision (formerly *N.J.A.C. 1:1-13.1 to 1:1-13.4*) was upheld in *In re Uniform Adm'n Procedure Rules*, *supra*, 90 N.J. at 106. See also *In the Matter of Robros Recycling Corporation*, 226 N.J. Super. 343, 350 (App. Div. 1988).

The ALJ issued his Initial Decision for summary decision on the issue of jurisdiction on December 12, 1985. He stated the issue as follows:

The dispute at this posture of the case concerns the weight to be accorded to the Director's determination on jurisdiction. The question arises because neither in the 52 page document entitled "Finding of Probable Cause" nor in the transmittal letter to the Office of Administrative Law did the Director state whether she intended that determination to be final (and therefore binding on OAL) or whether it was merely preliminary (and therefore subject to a *de novo* hearing).

He concluded the "law of the case doctrine," *State v. Hale*, 127 N.J. Super. 407, 410-411 (App. Div. 1974), "requires, under the circumstances here, that the Division's jurisdictional ruling be considered final." He also concluded the



Director intended for her finding on jurisdiction to be final. The Director adopted the ALJ's Initial Decision and entered an order for partial summary decision on the issue of jurisdiction on February 16, 1986.

The clubs were virtually led, albeit inadvertently, into a trap. It is clear from our August 1, 1983 decision that the remand contemplated a plenary hearing before the Division if material factual issues were disputed. It is also clear that at the conclusion of the fact-finding conference, substantial and material factual disputes existed. The use of the fact-finding conference to decide preliminarily the threshold question of probable cause was not proscribed by our decision. But the fact-finding conference in lieu of a plenary hearing may be employed solely as an investigative technique and not for adjudicatory purposes. Correspondence from the Division to counsel for the parties made this unmistakably clear. Beyond the correspondence, *N.J.A.C.* 13:4-2.3(a)1 and (b)6, under which the Division operates, state the fact-finding conference is neither "an adjudication of the merits of the complaint," nor even "a hearing on the merits of a case," but merely "a means of investigation."

Once material factual disputes were found to exist at the fact-finding conference, a trial-type hearing was required. Despite assurances that such a hearing would be conducted, Sincaglia resolved the disputed facts. See Appendix A, B, C and D. We find no provision in *N.J.A.C.* 13:4-2.3 permitting such a resolution. These factual findings were adopted and relied upon by the Director in her decision on probable cause.

Similarly, the Director in her Findings on Probable Cause relied in part on unsworn testimony taken during the fact-finding conferences from Gordon Reed, Manager of The University Cottage Club, Michael O'Malley, Manager of Ivy Club, Shelly Rigger, a 1984 graduate of Princeton, and Gordon R. Harrison, Manager of Tiger Inn and other eating clubs. The use of unsworn testimony in the adjudicatory process clearly contravened *N.J.S.A.* 10:5-16. The Director also relied on 40 documents not stipulated by either party. This is

but another example of deciding material factual disputes without a trial-type hearing.

We are persuaded that the summary decision on jurisdiction must be reversed. In the circumstances of this case, which we have articulated, the clubs have not been afforded administrative due process. This is a hotly contested case. Despite the fact that the parties have stipulated 230 facts, many material factual disputes remain. It was highly improper for Sincaglia or the Director to resolve disputed adjudicative facts without a trial-type hearing. Sincaglia was obligated to determine whether material adjudicative facts existed but not to decide them.

The rule under which the summary decision was based, *N.J.A.C.* 1:1-12.5, precludes a summary decision if material factual disputes exist in much the same way as *R.* 4:46-2. See *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 73-75 (1954). Only in a trial-type hearing can disputed adjudicative facts be resolved. *Bally Mfg. Corp. v. Casino Control Com'n*, *supra*, 85 *N.J.* at 334; *Cunningham v. Dept. of Civil Service*, *supra*, 69 *N.J.* at 24-25; *N.J.S.A.* 52:14B-9. The broad discretion which the Director has in deciding how to proceed in a given case, or when to order a hearing pursuant to *N.J.A.C.* 13:3-12.1(a), is circumscribed by the requirement of administrative due process, *N.J.S.A.* 52:14F-8(b) and *N.J.S.A.* 10:5-16.

In this same connection, we observe that in the circumstances of this case reliance on the law of the case doctrine represents an abuse of discretion. It is well established that application of the law of the case doctrine is discretionary and not mandatory. *State v. Reldan*, 100 *N.J.* 187, 205 (1985). Because there was no trial-type hearing to resolve disputed adjudicative facts, the ends of justice were disserved. We therefore reverse the summary decision on jurisdiction.

The ALJ also granted Frank's motion for partial summary decision on liability. In his June 16, 1986 Initial Decision the ALJ concluded that based on the summary decision on jurisdiction, no material factual issues existed. He found that Ivy and the Tiger Inn intentionally exclude women in general from membership. He also found that Ivy and the Tiger Inn had engaged in sex discrimination in violation of *N.J.S.A.*

10:5-12(f). On July 28, 1986 the Director adopted the ALJ's Initial Decision finding sex discrimination.

Because the procedure and factual determination which undergird the summary decision on liability are so intimately related to the summary decision on jurisdiction, both summary decisions are hereby reversed.

Notwithstanding our reversal of summary decisions on jurisdiction and liability, we are completely satisfied that the Director's threshold finding of probable cause required by *N.J.S.A.* 10:5-14 is supported by the record. As we noted previously, a trial-type hearing was not required for the investigative inquiry required by *N.J.S.A.* 10:5-14. Based on the 230 stipulations of the parties, we are satisfied that probable cause has been established to believe that *N.J.S.A.* 10:5-12(f) has been violated. This is merely a threshold determination and is not dispositive of the merits of the case. The procedural irregularities which require a reversal, had no impact on this threshold determination.

To summarize, we reverse the orders of the Director dated February 6, 1986 and July 28, 1986. It follows from those reversals that the final order dated May 26, 1987 respecting damages and other remedies must be vacated as it is presently without legal foundation. The case is remanded to the Director who is directed to forward the case to the OAL to conduct a trial-type hearing on the issues of (1) whether the clubs fall within the public accommodation section of the Law Against Discrimination; *N.J.S.A.* 10:5-5(1) and 10:5-12f; (2) whether the clubs engaged in sex discrimination against Frank in violation of *N.J.S.A.* 10:5-12f; and (3) what remedy should be provided if the law was violated. All of these issues must be adjudicated at a trial-type hearing. Summary decision on either issue is precluded by the existing record. The 230 stipulations shall be introduced at the trial-type hearing without further formal proof. The transcripts of the hearing on remedies and damages may also be used. The parties are permitted to freely supplement the record on all aspects of the hearing. We do not retain jurisdiction.

Reversed and remanded.

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## APPENDIX A

B. THE FOLLOWING STIPULATIONS *PROPOSED BY COMPLAINANT* WERE NOT ACCEPTED BY RESPONDENTS EITHER AS PROPOSED OR REVISED AND REMAIN IN DISPUTE. BASED UPON ALL OF THE MATERIAL EVIDENCE SUBMITTED, THE DIVISION FINDS AS FOLLOWS:

STIPULATION # 3—The Division holds that Princeton University, a private, non-sectarian institution of higher education, is a place of public accomm[o]dation as defined by N.J.S.A. 10:5-1, *et seq.*

STIPULATION #11—The record herein does not support the proposal that the all-male clubs regularly advertise their parties at other schools. The record does indicate, however, that students from other schools are made aware of and attend functions at the all-male clubs.

STIPULATION #14—The record herein indicates that Ivy Club, and University Cottage Club sought permission to form from Princeton University. There is no evidence to suggest that Tiger Inn sought such permission. Further, the record does not support the proposal that Princeton University granted the "Clubs" formal permission to organize.

STIPULATION #15—The record herein demonstrates that after the "clubs" were formed, committees made up of faculty members were appointed by the Princeton University Board of Trustees to monitor the operations of the "clubs". Such practice, however, ceased prior to Complainant's admission to Princeton.

STIPULATION #16—The record herein demonstrates that faculty members of Princeton University served on "club" committees which selected new members. *This practice, however, ceased prior to Complainant's admission to Princeton.*

STIPULATION #17—The record herein demonstrates that the Princeton University Dean of Students' Affairs Office has been involved in setting the dates for the Spring "club" membership selection procedure. This involvement occurred prior to Complainant's admission to Princeton.

STIPULATION #18—The record herein does not support Complainant's stipulation as proposed. The record does indicate, however, that Princeton University has attempted from time to time to persuade the "clubs" to adjust their dates for Bicker to accommodate the academic calender.

STIPULATION #19—The record herein indicates that an "Interclub Agreement" exists between the "clubs" and Princeton University which at least in part intends to regulate the behavior of "club" members and their guests on the "clubs' " premises.

## APPENDIX B

**B. THE FOLLOWING STIPULATIONS PROPOSED BY COMPLAINANT WERE NOT ACCEPTED BY RESPONDENTS EITHER AS PROPOSED OR REVISED AND REMAIN IN DISPUTE. BASED UPON ALL OF THE MATERIAL EVIDENCE SUBMITTED, THE DIVISION FINDS AS FOLLOWS:**

- #11—The record herein does not support the proposal that the all-male clubs regularly advertise their parties at other schools. The record does indicate, however, that students from other schools are made aware of and attend functions at the all-male clubs.
- #14—The record herein indicates that Ivy Club, and University Cottage Club sought permission to form from Princeton University. There is no evidence to suggest that Tiger Inn sought such permission. Further, the record does not support the proposal that Princeton University granted the "Clubs" formal permission to organize.
- #15—The record herein demonstrates that after the "clubs" were formed committees made up of faculty members were appointed by the Princeton University Board of Trustees to monitor the operations of the "clubs". Such practice, however, ceased prior to Complainant's admission to Princeton.
- #16—The record herein demonstrates that faculty members of Princeton University served on "club" committees which established Bicker procedures. This practice, however, ceased prior to Complainant's admission to Princeton.
- #17—The record herein demonstrates that the Princeton University Dean of Student Affairs Office has been involved in setting the dates for the Spring "club" membership selection procedure. This involvement



occurred prior to Complainant's admission to Princeton University.

#18—The record herein does not support Complainant's stipulation as proposed. The record does indicate, however, that Princeton University has attempted from time to time to persuade the "clubs" to adjust their dates for Bicker to accommodate the academic calend[a]r.

#19—The record herein indicates that an "Interclub Agreement" exists between the "clubs" and Princeton University which, at least in part, intends to regulate the behavior of "club" members and their guests on the "clubs" premises. (No executed copy of this "Agreement" has been produced by any party.)

C. THE FOLLOWING STIPULATIONS, IF ACCEPTED, WOULD REQUIRE CONCLUSIONS OF THE KIND THAT WILL BE MADE BY THE DIVISION UPON REVIEW OF THE ENTIRE RECORD TAKEN AS A WHOLE. THEREFORE, THEY HAVE NOT BEEN ACCEPTED OR REJECTED AT THIS TIME.

# 6—Ivy Club, Tiger Inn, and the University Cottage Club (hereinafter the "all-male clubs") are an integral part of Princeton University.

#30—The opportunity to join an eating club is one of the advantages in attending Princeton.

## APPENDIX C

E. THE FOLLOWING STIPULATIONS PROPOSED BY RESPONDENTS WERE NOT ACCEPTED BY COMPLAINANT EITHER AS PROPOSED OR AS MODIFIED AND *REMAIN IN DISPUTE*. BASED UPON ALL OF THE MATERIAL EVIDENCE SUBMITTED, THE DIVISION FINDS AS FOLLOWS:

STIPULATION # 58—The record herein indicates that while each “club” devises its own rules for Bicker, these rules are influenced by Princeton University’s rules and regulations.

STIPULATION # 61—The record herein indicates that the rules governing “bickerees” are now devised by the Committee on Bicker Administration. Historically, however, Princeton University has had some degree of involvement with the rulemaking process.

STIPULATION #110—The record herein indicates that Princeton University assumes some oversight responsibilities with respect to the conduct of the members of the all-male clubs.

STIPULATION #111—The record herein indicates that the activities of the all-male clubs are conducted for the benefit of their members, not the public.

STIPULATION #112—The record herein indicates that the all-male clubs do not always limit the use of the facilities and services of their clubs to their members in good standing and their guests.

STIPULATION #118—There is no evidence in the record that will dispute the fact that Tiger Inn does

not invite guest lecturers to speak on its premises.

STIPULATION #121—The record indicates that the all-male clubs are governed by their members.

STIPULATION #122—The record herein indicates that the all-male clubs' functions and affairs are managed by their members.

STIPULATION #137—The record herein indicates that Princeton University has no jurisdiction or authority over graduate members of the all-male clubs[.]

STIPULATION #171—The record herein indicates that when Princeton snowplows travel between . University facilities located at the opposite ends of Prospect Avenue, they often clear the public right-of-way (sidewalks) in front of Ivy, Cottage, and Tiger Inn without the all-male clubs' permission.

**Order of the New Jersey Division  
on Civil Rights Dated May 26, 1987**

**STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION ON CIVIL RIGHTS**

**OAL Dkt. No. CRT 5042-85  
DCR Dkt. Nos. PL-05-1678, 1679, 1680**

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**SALLY FRANK,**

*Complainant,*

**—v.—**

**IVY CLUB, UNIVERSITY COTTAGE CLUB, TIGER INN,  
AND TRUSTEES OF PRINCETON UNIVERSITY,**

*Respondents.*

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**ADMINISTRATIVE ACTION FINDINGS,  
DETERMINATION AND ORDER**

**[APPEARANCES OMITTED]**

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**BY THE DIRECTOR:**

**PROCEDURAL HISTORY**

By way of background information, in December of 1979, Ms. Sally Frank filed a Verified Complaint against Ivy Club, Tiger Inn and the University Cottage Club as well as Princeton University alleging discrimination based on sex in a place of public accommodation in violation of *N.J.S.A. 10:5-12(f)*. Respondent Clubs responded to the Complaint by denying that the clubs were places of public accommodation. The

three clubs also asserted that their members' freedom of association rights would be violated if the Complainant was granted the requested relief. In answer to the Complaint, Princeton University denied that the University was a place of public accommodation. Princeton University also claimed the University had committed no discriminatory acts.

The complete procedural history of this case is set forth in Judge Miller's Initial Decisions, dated December 12, 1985 and June 16, 1986, and in my Order of Partial Summary Decision on Jurisdiction, dated February 6, 1986.

On January 28, 1987, the Honorable Robert S. Miller, Administrative Law Judge (ALJ) issued an Initial Decision (ID), which was received by the Division on Civil Rights on January 29, 1987.

At the request of the parties, an extension of time to file exceptions was granted by Pamela S. Poff, Director, Division on Civil Rights and certified on February 13, 1987 by the Honorable Ronald I. Parker, Acting Director and Chief ALJ, wherein the time period for Complainant to file exceptions was extended until February 27, 1987 and Respondents were given five (5) days from receipt of Complainant's exceptions to reply.

The Director observes that the parties filed exceptions and objections to the ID in a timely fashion pursuant to *N.J.A.C.* 1:1-16.4 a, b and c.

Due to the complexity of the extensive record, the number of parties and the novel issues involved which required more than the usual research, the Director requested and was granted a further extension of time until May 26, 1987 for review of the record and the rendering of her Final Decision.

Since the issues of jurisdiction and liability have already been resolved in favor of the Complainant, the Initial Decision was to address only the question of remedies. Three separate areas of remedy are discussed in the Initial Decision: (1) the amount of pain and humiliation damages that should be awarded; (2) whether the clubs should be required to admit Sally Frank as a member; and (3) whether the clubs should be required to admit women or should be ordered to sever their ties with the University. For the reasons discussed

and humiliation, and I will so order. Compare *Scaravelloni, supra*.

### OFFER OF MEMBERSHIP

The ALJ stated in his ID that although the Director could require that the clubs make an offer of membership to Complainant, he did not think that remedy was either appropriate or desirable. See ID at 40. He based this conclusion on four reasons. First, the Complainant's personality, etc. are not similar to those who are members of the clubs. Second, the clubs should not be forced to give up their selectivity and Complainant, if male, would not have met their selectivity requirements. Third, he was not convinced that her interest in joining the clubs was sincere. In fact, Ms. Frank testified that during her sophomore year, she decided to bicker only to force the clubs to go coed. It was only after that experience that she began to desire membership as a way of interacting with other club members. The ALJ's other reason was that:

The law does not favor the retroactive imposition of new standards of membership, *Hebard v. Basking Ridge Fire Co., No. 1*, 164 N.J. Super. 77 (App. Div. 1978), certif. den. 81 N.J. 294 (1979), nor a remedy which in fact creates a form of reverse discrimination. *Flanders v. William Paterson College of N.J.*, 163 N.J. Super. 225 (App. Div. 1978). To do that, or to create a sinecure for a person who has been offended by an act of discrimination, would "profane" the estimable policy and purpose of the law. *Talman v. Board of Trustees*, at 540.

On this issue I find that the ALJ reached the proper conclusion that such a remedy, although within the power of the Director to order, should not be ordered under the facts of this case. The ALJ, having the opportunity to observe the demeanor of the witness during testimony, was not persuaded that Complainant had a sincere and genuine desire to be a



member of the club.\* This conclusion is supported by the fact that Complainant was generally opposed to the entire club system. Furthermore, Complainant's personality and interests are such that had Ms. Frank been a male, she would not have received an offer of membership. Under the circumstances, therefore, Complainant will not be granted membership as a part of a make whole remedy.

However, the ALJ's discussion that such a remedy would be the retroactive imposition of new standards of membership or would create reverse discrimination is unclear and is rejected. The clubs are hereby advised that unless it can be demonstrated that a woman would not have been offered membership if she was male, an order requiring an offer of membership would clearly be appropriate.\*\*

#### ORDER ADMITTANCE OF WOMEN OR SEVERANCE OF TIES

The final issue addressed by the ALJ was whether the clubs should be required to admit women or whether they should be ordered to sever the ties that connect them with Princeton University thereby taking themselves outside the jurisdiction of the Law Against Discrimination. The ALJ found that the severing of ties was the better choice and recommended that the clubs and Princeton University be ordered to sever their ties. I find that the reasoning in the ALJ's ID with respect to the severing of ties is fundamentally flawed and I reject his

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\* This fact does not negate Complainant's right to damages for the humiliation which she suffered. Complainant's situation can be analogized to that of a tester in a housing discrimination case. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).

\*\* The clubs are further put on notice that a person's opposition to the clubs' all male policy cannot be a basis for excluding the person (male or female) from membership. To do so would violate the retaliation provisions of the LAD. This appears to have been a factor in their consideration of new members.

## APPENDIX D

E. THE FOLLOWING STIPULATIONS PROPOSED BY RESPONDENTS WERE *NOT ACCEPTED BY COMPLAINANT* EITHER AS PROPOSED OR AS MODIFIED AND REMAIN IN DISPUTE. BASED UPON ALL OF THE MATERIAL EVIDENCE SUBMITTED, THE DIVISION FINDS AS FOLLOWS:

58. The record herein indicates that while each "club" devises its own rules for Bicker, these rules are influenced by Princeton University's rules and regulations. (Princeton University's influence does not extend to the internal selection process of each "club") [.]
61. The record herein indicates that the rules governing "bickerees" are now devised by the Committee on Bicker Administration. Historically, however, Princeton University has had some degree of involvement with the rulemaking process. (Princeton University's involvement does not extend to the internal selection process of each "club").
65. Princeton University does not involve itself in the Bicker process but for those descriptions of the "clubs" listed in the Choices handbook distributed by Princeton University to all of its students.
110. The record herein indicates that Princeton University assumes some oversight responsibilities with respect to the conduct of the undergraduate members of the all male clubs.
111. The record herein indicates that the activities of the all-male clubs are conducted for the benefit of their members, not the public.
112. The record herein indicates that the all-male clubs do not always limit the use of the facilities and services of their clubs to their members in good standing and their guests.

118. There is no evidence in the record that will dispute the fact that Tiger Inn does not invite guest lecturers to speak on its premises.
121. The record indicates that the all-male clubs are governed by their members.
122. The record herein indicates that the all-male clubs' functions and affairs are managed by their members.
137. The record herein indicates that Princeton University has no jurisdiction or authority over graduate members of the all-male clubs.
171. The record herein indicates that when Princeton snow-plows travel between University facilities located at the opposite ends of Prospect Street, they often clear the public right-of-way (sidewalks) in front of Ivy, Cottage, and Tiger Inn without the all-male clubs' permission.

F. THE FOLLOWING PROPOSED STIPULATION, IF ACCEPTED, WOULD REQUIRE A CONCLUSION OF THE KIND THAT WILL BE MADE BY THE DIVISION UPON REVIEW OF THE ENTIRE RECORD TAKEN AS A WHOLE. THEREFORE, IT *HAS NOT BEEN ACCEPTED OR REJECTED AT THIS TIME.*

#35—Tiger Inn, Cottage and Ivy are *bona fide* clubs founded for the social and recreational and dining purposes of their members.

below, the ALJ's decision is adopted in part, modified in part and rejected in part.

### PAIN AND HUMILIATION DAMAGES

In his ID the ALJ recommended that the two clubs should be jointly and severally liable for \$2,500 in pain and humiliation damages. In determining this amount the ALJ confined the liability for pain and humiliation to the years that Ms. Frank was an undergraduate student at Princeton. He extended it, however, to include as foreseeable not only hurtful acts by club members but also those by other students. Additionally, the ALJ mitigated the damages to be awarded by three factors. See ID at 39. These three factors were (1) Respondent's good faith belief that they were acting legally; (2) Complainant's foreknowledge of Respondents' all male policy; and (3) the generally polite and courteous treatment she received from the individual members of the clubs. The ALJ then proceeded to note that pain and humiliation damages were "the imposition of a monetary award for deterrence purposes[.] . . ." ID. at 39.

I find that the monetary award to a Complainant for pain and humiliation is the part of a make whole remedy designed to compensate an individual for the frustration, anger and humiliation suffered. See *Zahorian v. Russell Fitt Real Estate Agency*, 62 N.J. 399 (1973). To view this remedy as a deterrent rather than compensation for an injury is erroneous. While the Director has the power to award penalties for violations occurring subsequent to the effective date of N.J.S.A. 10:5-14.1a, pain and humiliation damages are not a penalty but are a means of remedying an injury to a Complainant.

In determining pain and humiliation damages, the ALJ should assess the injury done to the Complainant. While the amount is clearly difficult to assess the factors used should focus on the harm suffered by the Complainant. Factoring in how the Respondents treated Complainant is, therefore, appropriate. However, it is inappropriate to look at the good or bad faith of the Respondents. That factor does not mea-

sure the extent of the injury to the Complainant but instead focuses on the deterrent aspect.

Moreover, factoring in whether the Complainant had foreknowledge of the policy is also inappropriate unless the ALJ was finding that the Complainant was less frustrated, angered or humiliated because the policy was known. In general, however, there is no reason to conclude that a victim of discrimination is any less hurt by a sign over the door which refuses him/her entry than by being told at the door that he/she cannot enter. As Complainant points out in her exceptions, using this as a mitigating factor only encourages more blatant discrimination. The purpose of the remedial portion of the statute, however, is to eradicate such discrimination and make whole its victims not to encourage more blatant acts by discriminators. See *N.J.S.A. 10:5-12(f)*, prohibiting a place of public accommodation from posting notices that persons of one sex are unwelcome. Where a Complainant encounters such blatant discrimination and is told point blank that she is unwanted because of her gender, the resulting emotional pain warrants an award of damages. Compare *Scaravelloni v. Butterfield Enterprises, Inc.*, 8 *N.J.A.R.* 89 (1984). Therefore, the mitigation factors which the ALJ relied on in assessing the amount for pain and humiliation are rejected.

In reviewing the record I find evidence that Complainant was made to feel uncomfortable, upset and angry as a result of Respondents' discriminatory practices and the hostility directed at her as a result of her pursuing her civil rights complaint (1T 58-59; 1T 96; 1T 124; 2T 50; 2T 55)\*. I also find that while she was an undergraduate, Complainant was singled out for harassment and personal abuse within the University community, of which the clubs are a part, which was a direct result of her opposition to the discrimination practiced by Respondents (1T 85; 1T 96-97; 2T 55-56). Without considering the mitigating factors erroneously cited by the ALJ, I would award Complainant \$5,000 for her pain

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\* 1T refers to transcript of July 29, 1986.

2T refers to transcript of July 30, 1986.



recommendation. The clubs will be ordered to admit women in future membership selections.\*

The ALJ initially spends over three pages of the initial decision reviewing federal law in the area. More specifically he discusses the fact that Congress "plainly expressed its intention to exclude college social organizations from the reach of federal anti-discrimination legislation". ID at 42. The conclusion he draws from the express exemption in the federal scheme is "it is not unreasonable to suppose that . . . [the New Jersey Legislature] may also have intended to exempt fraternities, sororities and other CSO's". ID at 42. This conclusion runs counter to both the ALJ's initial decision on jurisdiction and my jurisdictional decision of February 6, 1986, and goes beyond the scope of the issue before the ALJ, namely the appropriate remedy in this case.

The New Jersey Legislature has often modeled provisions of its anti-discrimination legislation after federal provisions. See, e.g., Governor's Reconsideration and Recommendation Statement, A 1042 - L. 1985 c. 73 reprinted at *N.J.S.A.* 10:3-1 ("The retirement allowance threshold . . . should be reduced . . . so that the exemption conforms with a similar provision within the federal Age Discrimination in Employment Act"). In the area of exemptions for private clubs, however, New Jersey has clearly chosen language reflecting a narrower exemption in spite of the broader federal language. Proper statutory interpretation would lead to the conclusion that by not incorporating a specific exemption, the Legislature, in fact, chose not to have such an exemption. Furthermore, in my initial jurisdictional decision issued as part of the finding of probable cause, I specifically addressed the

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\* I note that not only has the Complainant filed exceptions opposing severance as a remedy but Princeton University has also filed exceptions opposing the ALJ's recommendation that the clubs and the University be ordered to sever their ties. Princeton argues that "the University should not be ordered to sever the limited ties specified by the Office of Administrative Law, since to do so would fail to sever the important relationships that exist between the Clubs and the University, make the University an unwilling partner to gender discrimination, and run counter to the University's educational objectives." Princeton Exceptions at 3.



broader federal exemption and concluded that the New Jersey exemption was narrower.

The ALJ's discussion on the First Amendment rights of the clubs is also rejected as inconsistent with the jurisdictional finding. In the Finding of Probable Cause (FPC), which was incorporated in my February 6, 1986 ruling (Partial Summary Decision at 7), I specifically addressed the clubs' First Amendment claims of freedom of association rights and found that any rights that they may have to freely associate did not include a right to discriminate on the basis of sex. The ALJ's reliance on free association rights is therefore misplaced. My February 6, 1986 ruling is hereby reaffirmed. See *Bd. of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 55 U.S.L.W. 4606 (U.S. May 5, 1987).

The ALJ further erred in ordering the clubs to sever ties to Princeton University rather than ordering them to admit women. A careful review of the jurisdictional decision, as Princeton clearly points out in its exceptions, makes it "apparent that the relationship upon which the Director relied extends far beyond those ties which the Respondent clubs seek to sever . . ." Princeton Exceptions at Appendix A, ii, and which the ALJ ordered the clubs to sever. In this regard, I modify the ALJ's Finding of Fact #37 on p. 26 of the I.D. by adding to it those additional Findings of Fact contained in pp. 1-36 of the Finding of Probable Cause in this matter. One of the key factors in the jurisdictional decision was that the "clubs are held out as part of a club system which services Princeton students". FPC at 41. Yet as Princeton points out in its exceptions, the ALJ does not recommend that they alter that relationship. To begin with, there is "no recommendation that the Respondent clubs sever their relationship with Princeton by opening their doors to members from other colleges and universities." Princeton Exceptions, Appendix A, ii. Also, "[a]lthough bicker is an integral part of the club system for selective clubs, the OAL made no recommendation that the Respondent clubs . . . withdraw[ ] from the bicker process." *Id.* Furthermore, the sophomore class committee that runs bicker produced publications that "are an integral part of the bicker process and

help funnel Princeton's students to the clubs. . . [yet] the OAL . . . made no recommendation that they sever the ties embodied and fostered by these non-university publications". *Id.* at iii. The various organizations that link the clubs to one another were significant to the Director's finding of jurisdiction, see FPC at 35 and 44, and yet the ALJ did not require the clubs to withdraw from these interclub organizations. Additionally, although ordered to stop meal exchange programs with Princeton, the ALJ did not require the interclub's meal exchange program to be stopped nor did he address "the larger question of the Respondents' role in feeding Princeton undergraduates which helped to create the jurisdictional relationship in the first place". *Id.* at iv. These ties between the clubs that link the Respondent clubs to the club system at Princeton University are as significant if not more significant than the ties noted by the ALJ.

In addition to the ALJ's recommendation being so clearly inconsistent with the jurisdictional findings, the ALJ also misrepresents the choices at issue. He suggests that the alternative to ordering the clubs to sever ties is to "compel the clubs to maintain their symbiotic ties" or to "forbid Respondents from changing their relationship with Princeton . . .". *Id.* at 45. "If those tangible ties can be severed, I see no compelling reason to forbid it." *Id.* at 47. The question however is not whether the clubs should be *compelled* to remain tied to Princeton but whether the Director should be *ordering* the severance of those ties so that the clubs can continue to discriminate. The clubs could have already severed those ties suggested by the ALJ on their own but have chosen not to do so.

The entire basis for the ALJ's conclusion that it is better to sever the ties is, as discussed *supra*, based on faulty premises and is inconsistent with the prior determination of the Director on jurisdiction. Moreover, his recommended remedy is inconsistent with the explicit language of the statute regarding remedies as well as the policies underlying the statute. The ALJ's recommended remedy is therefore rejected. The clubs will not be ordered to sever their ties. They will be ordered to admit women.

Since it is already determined in this matter that the clubs are within the jurisdiction of the Law Against Discrimination (LAD) and that they have, in fact, violated the law, the only question is that of remedy. The statute provides:

If, upon all evidence at the hearing the director shall find that the respondent has engaged in any unlawful employment practice or unlawful discrimination as defined in this act, the director shall state his findings of fact and conclusions of law and *shall issue* and cause to be served on such respondent *an order requiring such respondent to cease and desist from such unlawful employment practice or unlawful discrimination and to take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership, in any respondent labor organization, or extending full and equal accommodations, advantages, facilities, and privileges to all persons, as, in the judgment of the director, will effectuate the purpose of this act, and including a requirement for report of the manner of compliance.* [N.J.S.A. 10:5-17 (emphasis added)].

Given the mandatory language of the statute, it is questionable whether the Director has the discretion not to order that the clubs admit women. But more significantly, in light of the purpose of the Law Against Discrimination and the broad construction given the statute as remedial legislation, see *Zahorian, supra*; *Jackson v. Concord Company*, 54 N.J. 113 (1969), it would be inconsistent with the goal of the Legislature to eradicate discrimination, if I were not to order the clubs to admit women.

The LAD was created "to prevent and eliminate" discrimination. N.J.S.A. 10:5-6. "The legislative intent was to create an effective enforcement agency which would serve towards eradication of the 'cancer of discrimination.'" *Zahorian, supra*, at 412. Such a mandate requires the elimination of discrimination that violates the law, not the privatization of such discrimination. Even assuming for the sake of argument

that the clubs could avoid the jurisdiction of the LAD by severing certain ties with Princeton, ordering these clubs out of the jurisdiction of the Division would undermine rather than effectuate the purposes of the statute. It would be comparable to ordering Clover Hill Swimming Club to stop advertising instead of ordering the club to admit blacks or ordering the Little League to become more selective instead of ordering the group to admit females. See *National Organization for Women v. Little League Baseball*, 127 N.J. Super. 522 (App. Div. 1974) aff'd mem. 67 N.J. 320 (1974); *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 25 (1966).<sup>\*</sup> It would be akin to ordering a discriminating landlord to cease renting apartments instead of ordering him to rent to unmarried women. See *Zahorian, supra*. This would be inconsistent with the purpose of the statute and with basic principles of law enforcement. The clubs have been found to be places of public accommodation, subject to the strictures of the LAD, and I have found that they discriminate against women, in violation of the statute. A violation having been found, the Respondent clubs will be ordered to cease their discriminatory practices. It is beyond the scope of this cease and desist order to offer Respondents an advisory opinion as to possible ways by which they might avoid compliance with the LAD.

Having determined that the clubs will be ordered to admit women, I now turn to a question that the ALJ did not address—whether Princeton should be required to monitor compliance. It is my judgment that at this point no formal monitoring scheme is necessary. Cottage Club, which went coed in settlement, has already conducted a coed bicker and, according to the testimony before the ALJ, considered women candidates fairly. This was so despite the fact that the undergraduates in the club had been against the change and that it had been forced upon them by the graduate board.

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\* Attempts to privatize discrimination to allow it to continue is not new. In the 1960's to avoid integration of public schools, one county shut down the school system, replacing it with private schools. The Supreme Court, however, recognizing the discriminatory intent, ordered that the public schools be reopened. *Griffin v. County School Board*, 377 U.S. 218 (1964).

Given their good faith conduct and the testimony at the hearing that Ivy and Tiger would comply with any final order to admit women, I think it appropriate to rely on the good faith of the members of those two clubs to comply with my order without presently providing for specific monitoring by the University.

It is therefore on this \_\_\_\_ day of May 1987, hereby ORDERED that:

1. Respondents shall cease and desist from the doing of any act prohibited by the New Jersey Law Against Discrimination as set forth under *N.J.S.A. 10:5-1 et seq.*, and more specifically, Ivy Club and Tiger Inn shall cease and desist from excluding women from membership in their clubs.

2. Respondents Ivy Club and Tiger Inn shall be held jointly and severally liable for the sum of \$5,000 in compensatory damages for the humiliation and pain Complainant suffered as a result of Respondents' discriminatory acts. A check in the amount of \$5,000 shall be made payable to Sally Frank and forwarded to the Division on Civil Rights, Room 400, 1100 Raymond Boulevard, Newark, New Jersey 07102 within forty-five (45) days after receipt of this Order for transmittal to Complainant.

3. If the check mentioned in paragraph 2 above is not received within the prescribed time interest will run at 7.5% or such other amounts designated by the Court Rules from the date of this Order and continue during the pendency of this case.

4. Respondent clubs shall admit women in all future membership selections. Although Respondents may be selective in their membership practices, an applicant's gender or his/her past or present opposition to the clubs' all male policy cannot be a basis for excluding the person (male or female) from membership.

5. Respondent clubs are required to permit women to bicker, and to admit women for membership with the same courtesies, privileges and accommodations as males. More-



over, the selection process shall not apply to females any different standards for qualification than those applied to males.

6. Princeton University will not be required to presently monitor compliance by Ivy Club and Tiger Inn for the reasons set forth in this decision.

7. Respondents Ivy Club and Tiger Inn shall report in writing to the Division for the next two years, by June 15, 1988 and June 15, 1989, on the number of women admitted to membership during the 1987-88 school year and the 1988-89 school year.

8. Complainant, under the circumstances of this case, will not be granted membership in the clubs as a make whole remedy for the reasons expressed herein.

9. Complainant may apply to the Director for attorneys fees incurred in connection with this matter. Prior to submitting any such application, Complainant's attorney shall confer with Respondents' attorneys to attempt to stipulate to the amount of the fees.

10. Jurisdiction is retained by the Division on Civil Rights to observe and require compliance and to issue Supplemental Orders, if necessary to insure compliance with the foregoing provisions of this Order.

/s/ PAMELA S. POFF

Pamela S. Poff, Director  
Division on Civil Rights

DATED: May 26, 1987



**Decision of the New Jersey Office of  
Administrative Law (Miller, J.)  
Dated January 28, 1987**

**STATE OF NEW JERSEY  
OFFICE OF ADMINISTRATIVE LAW**

**INITIAL DECISION  
OAL DKT. No. CRT 5042-85  
AGENCY DKT. No. PL-05-1678, 1679, 1680**

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• SALLY FRANK,

*Complainant,*

—v.—

IVY CLUB, UNIVERSITY COTTAGE CLUB, TIGER INN,  
and TRUSTEES OF PRINCETON UNIVERSITY,

*Respondents.*

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[APPEARANCES OMITTED]

Record Closed: December 22, 1986

Decided January 28, 1987

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BEFORE ROBERT S. MILLER, ALJ:

**STATEMENT OF THE CASE**

This is another chapter in a history of civil rights litigation instituted by complainant Sally Frank more than eight years ago.

In her complaint Ms. Frank alleged that respondents violated the New Jersey Law Against Discrimination by discriminating against her on account of her sex. Respondents Ivy

Club ("Ivy"), Tiger Inn ("Tiger") and University Cottage Club ("Cottage") admitted that they excluded women from membership in their organizations but denied any violation of law. Respondent Trustees of Princeton University ("Princeton" or "the University") also denied any violation of law.

Because of prior rulings made by me and by the Director of the Division on Civil Rights, and further because of agreements of settlement which were reached between some of the parties, the issues remaining to be decided at this stage of the case are limited. They are as follows:

1. What amount of money damages, if any, should respondents Ivy and Tiger be required to pay to complainant?
2. Should respondents Ivy, Tiger and Cottage be required to offer complainant membership?
- 3(a) Should Ivy and Tiger be ordered to cease and desist from excluding women from membership?
- 3(b) If so, what plan or mechanism, if any, should be ordered to ensure that women be fairly considered for membership?
- 3(c) If a plan to ensure fair consideration for women is ordered, should Princeton be required to be part of that plan, viz., to monitor the admission practices of Ivy and Tiger?
- 3(d) As an alternative to requiring Ivy and Tiger to admit women as members, should they be ordered to sever the ties which presently connect them to the University?

### PROCEDURAL HISTORY

Details of the procedural history of this case are set forth in two prior initial decisions (decided December 12, 1985 and June 16, 1986) rendered by me. They need not be repeated here.

It should be noted, however, that on July 22, 1986, a written Stipulation and Order Concerning Partial Settlement was executed by complainant and Princeton. This was subsequently signed by me and entered as part of the record of the case.

Hearings were held on the issues noted above on several dates in July and August 1986. Extensive briefs and reply briefs were submitted thereafter, the last being received on December 22, 1986, on which date the record was closed.

The findings of fact which follow are based on and taken from the findings of fact submitted by the parties, verified by the transcript of the hearing and the exhibits.\*

## FINDINGS OF FACT

### I. COMPLAINANT'S PROPOSED FINDINGS OF FACT

- A. Sally Frank suffered pain and humiliation while she attempted to join Ivy Club and Tiger Inn and when she was rejected.
  - 1. Ms. Frank suffered discomfort while waiting at Ivy Club to speak to members in Spring 1979 bicker.
  - 2. Ms. Frank was upset by Tiger Inn's exclusion of her in her junior year.
  - 3. Ms. Frank was upset when she was not told the results of bicker.
  - 4. Although Ms. Frank knew that the clubs excluded women, experiencing rejection on the basis of sex was upsetting to her when it actually happened.

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\* In some instances the findings are taken verbatim from those proposed; in other cases, the language has been modified in order to achieve more objectivity. Some proposed findings I have rejected entirely. I have employed this format for reasons of convenience and completeness, but at the cost of some repetitiveness.

- B. Because the all-male clubs were not willing to change their discriminatory practices, Ms. Frank was compelled to file complaints to assert her rights. The actions by members of the all-male clubs taken subsequently to the filing of the complaints caused her to suffer additional pain and humiliation.
1. At reunions in 1985, club members asked Ms. Frank questions in a hostile manner.
  2. During the 1985 alumni parade, which included participation by Ivy, members of the class of 1955 carried insulting signs about Ms. Frank.
  3. During the 1985 alumni parade, club members chanted the names of their clubs with apparent hostility to Ms. Frank as she passed by.
  4. During the 1986 reunions, a club member told Ms. Frank to leave his class's party because she was causing trouble at his club.
- C. Ms. Frank suffered additional pain and humiliation from the actions of people who were members of the Princeton University community but who may not have been members of Ivy or Tiger.
1. There were incidents at reunions in 1985 and 1986 that upset Ms. Frank, including a man spitting at her.
  2. A T-shirt with a distinctly unflattering picture of Ms. Frank was worn and sold at the 1986 reunion.
  3. A 1983 or 1984 article in *Prospect Magazine* entitled "In Defense of Elitism" was demeaning towards Ms. Frank.
  4. A 1985 article in the *Daily Princetonian* entitled "Questioning the Real Motivations of Sally Frank" caused Ms. Frank pain.
  5. A 1984 joke issue of the *Daily Princetonian* carried a nasty and hurtful caricature of Ms. Frank.

- D. Ms. Frank was hurt by the isolation and harassment she suffered from some people at Princeton after she complained to the Division on Civil Rights.
- E. In response to her complaint, Ms. Frank suffered personal attacks which she had not suffered previously and which other campus activists did not experience.
  - 1. Ms. Frank was treated differently from other activists.
  - 2. The character of the debate about Ms. Frank and her actions was different from the debate about other people and other issues.
  - 3. People attacked Ms. Frank's womanhood and personhood.
  - 4. In response to Ms. Frank's complaint, people, including Ivy Club members, trivialized her activities and discounted her motives.
    - a. Following her complaint, Ms. Frank was accused of being active in "whatever radical cause was the fashion at the moment."
    - b. People accused Ms. Frank of not thinking out her position.
- F. The personal hostility and attacks directed at Ms. Frank caused her mental anguish and harmed her self-image. They also partially shaped her choice of law schools she considered attending.
- G. Ms. Frank tried to mitigate the damage caused her by the isolation and hostility she felt.
  - 1. Ms. Frank bickered at the coed selective clubs to try to limit the hostility.
  - 2. Ms. Frank made attempts in her senior year to communicate better with club presidents and others to decrease the hostility and isolation she felt.
  - 3. Ms. Frank sought help in dealing with the reactions and to understand them from an Assistant Dean of Students at Princeton who functioned as a counselor.

- H. At Princeton, a residential university, learning takes place both in the classroom and outside the classroom, including places such as the eating clubs.
- I. Some club members form lasting friendships at the clubs.
- J. The clubs provide a significant part of the social life for many Princeton students.
- K. There has never been a final unappealed official order from any state agency saying that Ivy and Tiger are distinctly private and may lawfully discriminate. Moreover, the final agency order from which an appeal was taken was issued after Ms. Frank graduated and, thus, after the clubs discriminated against her.
- L. Some female students at Princeton are unwilling to assert their rights to be considered at Ivy and Tiger or even to express their opposition to all-male clubs for fear of being subjected to harassment and hostility.
- M. Ms. Frank attempted to join the three clubs four different times, once each during her sophomore year and junior year and twice (fall and spring bicker) during her senior year.
- N. One reason Ms. Frank wished to join the clubs was so that she could get to know conservative students.
- O. Ms. Frank would not likely be offered membership if she were to bicker or now request alumni membership in Ivy, Tiger or Cottage.
  - 1. Ms. Frank has become a campus issue.
  - 2. A person who, as Ms. Frank, has *inter alia* expressed an opposition to all-male clubs, would be unlikely to get an offer of membership from Ivy.



3. Cottage is unlikely to give Ms. Frank an offer of membership.
    - a. Some women vocally supporting coeducation at Cottage were not offered membership in 1986.
    - b. The Cottage procedure for graduate membership makes it unlikely that a request for membership by Ms. Frank would be granted.
  4. Tiger is unlikely to offer membership to Ms. Frank.
- P. The ties between Princeton University and Ivy and Tiger consist of more than those the clubs suggest should be severed.
1. Club policies and practices have significant influence on the University community because a great deal of student life takes place there.
  2. If Ivy and Tiger were eliminated from the meal exchange and intramural athletic programs, Ivy and Tiger would become even more distinct than they are now.
  3. The fact that the respondent clubs are physically surrounded by Princeton University, as well as their historical relationship to Princeton University, constitutes an important connection between them and the University.
  4. Historically, Tiger has seen itself as closely tied to the University.
    - a. The constitution of Tiger requires that active members be elected to the club "in accordance with the rules established by the University authorities."
    - b. The "History of Tiger Inn, 1890-1940" reflects an attachment that many Tiger members have for the University.
  5. Historically, Ivy has seen itself as closely tied to Princeton University.

- a. According to Ivy, it has "contributed much to the quality of life in our beloved University" and is "one of Princeton's most distinguished, influential and important organizations."
- b. Ivy helped to define the role of the eating clubs at Princeton.
- c. Ivy members put the University first, above their club. As they put it, "in case of conflict between their duty to Princeton and their affection for Ivy, they had no choice but to stand for the best interests of the University as a whole."
- d. Clubs function, according to Ivy, to preserve "useful contact between the University and its graduates."

Q. Most undergraduate members of Ivy and Tiger now oppose the admission of women into their clubs.

- 1. The undergraduate members of Tiger have repeatedly voted to remain all-male.
- 2. The undergraduate members of Ivy very much want the club to stay all-male.

R. Some current and recent undergraduates have demonstrated hostility towards women who publicly seek or sought to coeducate Ivy, Tiger and Cottage.

- 1. The *Daily Princetonian* has recently printed pieces that show hostility towards Ms. Frank.
- 2. A student told Katherine Greider, presently an undergraduate at Princeton, that if she tried to bicker at all-male clubs, "We will pour beer on you, too."
- 3. Another woman who planned to bicker at the all-male clubs had beer poured on her at a club party.
- 4. A student shouted to Katherine Greider, "Hey Sally, want to meal exchange, you bitch."

5. A student who shortly thereafter joined Ivy shouted demeaning curses at Ms. Greider.
  6. Ms. Greider felt threatened when she attended a party at Tiger.
  7. Some answers to polls in the reserve room at the library suggested that Ms. Greider and Ms. Frank be thrown in a bonfire and eliminated from Princeton.
- S. To gain membership in Tiger, 100% support is required.
- T. A consensus is required for membership in Ivy.
- U. Ivy's constitution requires that proceedings "relating to the election of incoming undergraduate members shall be secret and confidential."
- V. There are no established objective criteria for choosing members of respondent clubs.
- W. Tiger regularly recruits members through male athletic activities.
- X. The undergraduates run bicker with practically no supervision.
- Y. In the past, Princeton University has regulated or attempted to regulate, and/or monitored or attempted to monitor, club selection procedures.
1. University officials have been involved in discussions to improve club selection procedures.
  2. A member of the faculty and/or administration has been on the club elections committee.
  3. Committees involving University trustees and/or administrators were appointed to discuss and/or regulate

the club situation in general or election procedures specifically.

4. University trustees at times set minimum grade requirements for membership in the clubs.

5. Students were suspended from the University for violating club election rules.

6. The University Trustees passed a resolution, never expressly repealed, setting forth University authority over the clubs.

7. The University Trustees and/or administration officials regulated when students could begin active membership in the clubs and eat there.

8. The University regulated or tried to influence the dates when bicker would take place.

9. In 1975, due to concern over health and safety of students, University officials informally supervised selection procedures at some nonselective clubs.

10. Among its officials, Princeton has an affirmative action officer and a dean in charge of discipline.

## II: PRINCETON'S PROPOSED FINDINGS OF FACT FINDING #1

Princeton University ("Princeton") is a private, nonsectarian institution of higher education, founded in 1746. Until 1968, Princeton admitted only male students as undergraduates. Women were admitted as undergraduates for the first time in 1969.

At present, there are 13 independent eating clubs in Princeton, New Jersey, which offer social, recreational and dining activities to their undergraduate members. During the 1983-1984 academic year, 1570 out of 2230 of Princeton's juniors and seniors had some variety of meal contract at one of these clubs. Those juniors and seniors who do not join clubs obtain dining contracts for a university-operated facility, pur-

chase individual meals at those facilities, eat at other establishments in or near Princeton, or prepare their own meals in dormitory kitchens.

Although they were originally selective and all-male, eight of the clubs are now nonselective and coed. They are Campus, Charter, Cloister Inn, Colonial, Dial Lodge, Elm, Quadrangle and Terrace. Admission to these nonselective clubs is by a lottery system, although Quadrangle Club requires each student seeking admission to collect the signatures of 15 of its members.

Five of the clubs are "selective." They are Ivy, Cottage, Tiger, Cap and Gown, and Tower. Membership in these clubs is by invitation only. Offers to join these clubs are extended after the club members vote on the applicants. Of these five, two, respondents Ivy and Tiger, are still all-male. Cottage has decided to accept female members and been dismissed from the case except for the issue of offering membership to complainant. Tower and Cap and Gown have, for several years, accepted women.

## FINDING #2

"Bicker" is the term for the process used by the five selective clubs for interviewing and selecting new members. Since at least 1977, there have been fall and spring bickers. The rules for bicker change from time to time. The process described below was in effect during the 4 years (1976-1980) that complainant was a student at the University.

A student at Princeton who is interested in one of the selective clubs must first register. Once registered, the student is required to attend three bicker sessions at each of the clubs to which application is being made. The bicker sessions are intended to give students a glimpse of life at the club and the club members an opportunity to evaluate the bickerees. The club members are required to submit written comments about bickerees with whom they have spoken. The club members then meet for a "bid session" to decide which bickerees will receive invitations to join the club.

Since 1979, Tiger's bicker chairman has had the responsibility to meet with the bicker representatives from the four other selective clubs to choose a sophomore to head the Committee on Bicker Administration ("CBA"). The CBA typically has both male and female members. Since at least 1978, the bicker process has been totally funded by the individual selective clubs.

From at least 1977 until the end of 1979, a small space in the area of the Dean of Student Affairs' Office was made available to the students administering the process for spring bicker registration. Registration consisted of applicants to all of the selective clubs picking up a form, filling it out, and dropping it in a cardboard box. Beginning in 1980, registration for spring bicker took place at Tower Club.

The Dean of Student Affairs did not have any control over the contents of the registration form or the bicker process in general.

Prior to 1980, CBA was permitted to use space in Princeton's Dillon Gymnasium for bicker administration. In 1980, the CBA requested and received permission to use different space, located in the basement of the Commons, one of the University's dining facilities. The use of the Commons space lasted until 1984. At the request of the students running the bicker process, Princeton changed locks on the spaces provided, without charge, through 1981. No rent was charged for the use of either space until 1982, at which time rent was charged. The 1984 spring bicker was administered from the CBA chairman's dormitory room.

Princeton made telephone service available to the members of the CBA, but charged them for it. The charges were paid by the sophomore class through 1977 and by the CBA beginning in 1978. The students on the CBA had access to time on Princeton's central computer, without charge, prior to the 1978-1979 academic year. During that year, a total of \$159.77 worth of computer time for the bicker process was used. Following that academic year, the CBA obtained computer time from another source.



## FINDING #3

Complainant Sally Frank was a student at Princeton from September 1976 through June 1980, when she graduated. Complainant attempted to bicker at the respondent clubs on several occasions.

During her sophomore year (1977-1978), Ms. Frank registered for spring bicker. She went to the Dean of Student Affairs' Office, found the bicker registration forms left there by the CBA, took one, completed it and put the completed form in the box provided for that purpose by the CBA. In completing the form, Ms. Frank used only her initials and responded "male" to the question concerning her gender. She subsequently received a printout with appointments at each of the selective clubs, including the respondents. Ms. Frank chose not to bicker at the coed selective clubs.

The following academic year (1978-1979), Ms. Frank again registered for spring bicker. She obtained the form at the Dean of Student Affairs' Office, again used her initials, left the gender question blank and deposited the form in the CBA's box. Ms. Frank received a telephone call from the chairwoman of the CBA, who informed her that she would not receive appointments at the respondent clubs. She then received a printout with appointments only at Cap and Gown and Tower, at which Ms. Frank chose not to bicker.

During the beginning of her senior year (1979-1980), Ms. Frank attempted, for the first time, to participate in fall bicker. In response to a notice in the Princeton student newspaper, *The Daily Princetonian*, Ms. Frank telephoned the respondent clubs to request permission to bicker. She did not go to the Dean's office or fill out the form used by the CBA for spring bicker, which process was not applicable. She did not attempt to bicker at Tower.

Ms. Frank participated in spring bicker during her senior year. In December of 1979, she obtained the CBA's registration form, again used her initials and did not respond to the gender question, and deposited the completed form in the CBA's box at the Dean's Office. Ms. Frank contacted the president of each of the respondent clubs about whether she

could bicker. She was permitted to bicker on only one occasion (at Ivy in the spring of 1979) during the three years she attempted to do so. She was totally denied the opportunity to bicker at respondent clubs in the spring of 1980. On the one occasion she was allowed to bicker, restrictions were placed on her that were not placed on men, and she was told not to have any false expectations of getting a bid. She never received a bid for membership from respondent clubs.

#### FINDING #4

At least since 1972, when Thomas H. Wright, Jr. became the University's chief legal officer, Princeton has played no role in the decision-making process through which the selective clubs choose their members. There is no evidence in the record that University personnel ever attended or participated in any bid session at any club. Nor is there any evidence that any club was required by the University to explain or justify its reasons for not choosing any bickeree.

#### FINDING #5

Over the past 100 years and more, the relationship between the University and the clubs has been cyclical. There have been periods of great stress and tension, followed by long periods of quiescence with little interaction between Princeton and the clubs. The clubs' membership selection practices have comprised one of the recurring areas of difficulty over the years.

In one instance, more than 45 years ago, the University sought to impose a change in membership selection practices on the clubs.\* This is described in a February 1967 article entitled "An Official Statement on the Club System" by the then Dean of Students, William D.O. Lippincott, as follows:

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\* The clubs protested this action and it is not clear whether the trustees actually imposed the system or whether the clubs acquiesced after the President of the University agreed to their conditions.

A significant aspect of the (1940-1941) club upheaval was that, for what appears to be the first time, the Board of Trustees emphatically asserted itself in regard to club matters. In the Minutes of January, 1941, the following principles are enunciated:

That the University is empowered by its charter "to make and establish such ordinances, orders and laws, as may tend to the good and wholesome government of the said college, and all students . . . thereof," and considers the system of election to upper class clubs an integral part of the undergraduate life, rightly subject to supervision by the University.

That method pursued should be the characteristic method in Princeton affairs of using reason instead of force so that no undergraduates would be compelled to join a club not of their choice and that *no club would be obliged to admit members not of its selection.*

That the University is obliged, in the light of present day conditions, to provide for continuity in the operation of a proper elective system by the creation of an official supervisory body to guide and assist the undergraduates in their problems. (emphasis added)

There is no evidence, however, that the Central Committee, the committee created by the Trustees' resolution, participated in the clubs' actual bid sessions. The method put forward by the Trustees, requiring bicker in groups ("iron-bounds"), did not last much beyond World War II.

By the time the Lippincott article was written, the bicker process had been virtually returned entirely to the undergraduates. During this last period, in addition to assuming responsibility for providing social and dining facilities outside the club system, the Board also acted positively in another way. During the middle 1950's, graduate interference in the elections, in some clubs, had become a problem. Conse-

quently, the Board sought the cooperation of the graduate governing bodies of the clubs, in order to leave election procedures entirely in the hands of the undergraduates. This was virtually accomplished. Implicit in the latter development was the University's assurance to the clubs that it, too, would leave elections to the students. A by-product was a lessening of the influence of the Central Committee on Clubs, which in recent years has done no more than provide procedural continuity, though it engineered one significant change—that of relocating the bicker period between terms so that at no point does it overlap with the academic schedule. The Central Committee had ceased to exist by the time Mr. Wright became University Counsel in 1972.

Although the 1941 Trustees thought it an appropriate exercise of their authority to attempt to supervise, in a general way, the club elections, the Trustees have long since abandoned any pretensions to have or to exercise such authority. For example, by January of 1967, although still concerned with the issue of the clubs' membership selection procedures, the Trustees were no longer seeking to impose solutions, but were instead "seeking to aid in developing, if possible, more suitable ways for sophomores to gain Club membership." The following resolution was adopted:

The Board of Trustees reaffirms a sense of responsibility with respect to the quality of student life and the way in which institutional arrangements affect and color it. This concern includes the operations of the Club System and particularly the procedures governing election to Club membership commonly known as "Bicker."

\* \* \*

The University must insist both that entrance to membership in the Clubs and that other aspects of Club life will be generally consonant with the values and ideals which we would have Princeton help young men to know and make their own.

For these reasons, the Board authorizes the President and the Chairman of the Committee on Student Life, in concert, to appoint a special Trustees committee to give

careful consideration to the issues posed by the existing system of Club elections and especially *to seek to aid* in developing, if possible, more suitable ways for sophomores to gain Club membership. (emphasis added)

In its June 1975 "Resolution on Eating Clubs," the Board stated:

\* \* \* At the same time the Board also recognizes that each club is a separate legal entity, independent of the other clubs and of the University, and that therefore each club adopts its own individual policies and practices and accepts the responsibility for them.

In April 1976, the "Final Report of the Princeton University Trustee Subcommittee on Eating Clubs" made the following observation:

\* \* \* Further, the University has always felt the need to exercise considerable delicacy in dealing with the clubs because they are separate, because they are jealous of their independence, and because the philosophy of some clubs on some points (such as the exclusion of women in certain clubs) does not accord with that of the University.

Thus, the views taken by the Trustees of 1941 are no longer held by their successors. In fact, the Trustees now view their authority in a directly opposite fashion.

#### FINDING #6

The University Cottage Club ("Cottage"), one of the original respondents in this action, settled with the complainant prior to the hearing. As part of that settlement, Cottage agreed to admit women as members.

Prior to the settlement, the undergraduate members of Cottage had not been in favor of admitting women. Nevertheless, after the settlement, the first coed bicker at Cottage



was, to paraphrase complainant's witness (Katherine Greider), "done right."

Q. What did doing it right mean?

A. Doing it right meant bickering women, the same way they would bicker men, and just try to get women that they would want to socialize with in their club.

\* \* \*

Q. What I think you also told us about this bicker session at Cottage was that they went about it in good faith?

A. Yes.

Q. They went out to get the best women they could?

A. Yes.

Ms. Greider believed that she and another student did not receive bids from Cottage because of their vocal advocacy of club coeducation.

#### FINDING #7

The remaining all-male respondent clubs, Tiger and Ivy, are governed by graduate boards of governors. Both graduate boards are aware of and conscientiously follow their duty to ensure that the clubs, and their undergraduate officers, boards and members, abide by their legal responsibilities, as they are understood at the time.\*

Corbin Miller, a member of the Ivy Board of Governors, testified that if these proceedings resulted in an order requiring Ivy to admit women, the graduate board would exercise its responsibility to see that the undergraduates comply with the order. Although Mr. Miller thought that it would be unnecessary to do so (because of the Cottage experience) and

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\* There was testimony from each club that the legality of their position was carefully and thoughtfully reviewed when Ms. Frank raised the issue of all-male membership and that all determinations were in their favor until the Division's 1985 finding of probable cause.



testified that the board would be loathe to involve itself in the bicker process, he testified that it would be done if necessary. He also testified that any written materials, such as comment cards, would be maintained intact after bicker if an order so required.

Stuart E. Rickerson, Esquire, a member of Tiger's Board of Governors, gave similar testimony. Unlike Ivy, the Tiger board reserves the right to ratify the selection of all undergraduate members, although no proposed member had been rejected by the graduate board in his memory. Mr. Rickerson testified that the graduate board would undertake to ensure that the undergraduates complied with an order for the admission of women resulting from these proceedings.

### III: PROPOSED FINDINGS OF FACT SUBMITTED BY IVY

#### *Procedural History*

1. In the spring of 1979, Sally Frank ("Frank"), then a female student at Princeton University, filed a sex discrimination complaint with the New Jersey Division on Civil Rights, Department of Law and Public Safety (the "Division"), against Princeton University (the "University"), The Ivy Club ("Ivy"), Tiger Inn ("Tiger") and The University Cottage Club ("Cottage").
2. On June 7, 1979, the Division, in a letter to Frank, stated that it had reviewed Frank's allegations and determined that Ivy, Tiger and Cottage were exempt from the New Jersey Law Against Discrimination because "they are distinctly private, as provided in N.J.S.A. 10:5-5 (1)." The Division then refused to process Ms. Frank's complaint.
3. On December 19, 1979, Frank filed her complaint for a second time against Princeton University, Ivy, Tiger and Cottage.

4. In her second complaint, Frank alleged that Ivy, Tiger and Cottage were public accommodations because they functioned as an arm of Princeton University and therefore were subject to the New Jersey Law Against Discrimination, *N.J.S.A. 10:5-1, et seq.*
5. Subsequent to the filing of the second complaint, the Division undertook an investigation. On December 9, 1981, the Division dismissed Frank's complaint, holding that Ivy, Tiger and Cottage were *bona fide* clubs distinctly private in nature and thus not subject to the jurisdiction of the Division.
6. Frank appealed the Division's December 9, 1981 Order. On August 1, 1983, the New Jersey Superior Court, Appellate Division, vacated the Division's final order of dismissal dated December 9, 1981, and remanded the matter to the New Jersey Division on Civil Rights for a hearing. No determination on the merits was made.
7. The Division then filed a Petition for Reconsideration which the Appellate Division denied on September 6, 1983.
8. On October 11, 1983, the Division resumed its fact-finding. The Division held two daylong fact-finding conferences on March 12, 1984 and April 3, 1984, accepting whatever documents or witnesses any party sought to submit.
9. On March 12, 1984, Frank filed amended verified complaints with the Division which, in addition to previous allegations, alleged that the Clubs by themselves were public accommodations under *N.J.S.A. 10:5-1 et seq.* Ivy, Tiger and Cottage denied this latest allegation as they had previous ones.
10. On May 14, 1985, a Finding of Probable Cause was issued by Pamela S. Poff, the Director of the Division, finding that the Division had jurisdiction over Ivy, Tiger and Cottage, and finding that probable

cause for discrimination existed. Shortly thereafter, the Division scheduled a conciliation conference. On June 7, 1985, Frank requested that her complaint be transferred from the Division to the Office of Administrative Law.

11. On December 12, 1985, Administrative Law Judge Robert S. Miller rendered an Initial Decision, Partial Summary Decision, on the issue of jurisdiction, in which he stated that the Finding of Probable Cause rendered by the Division on May 14, 1985 should be considered as a final agency decision on the issue of jurisdiction.
12. On February 6, 1986, Director Poff issued an Order of Partial Summary Decision affirming Judge Miller's decision and holding that the Division had jurisdiction over Ivy, Tiger and Cottage. As a result of the Partial Summary Decision, no hearing was held on the issue of jurisdiction.
13. On February 24, 1986, Administrative Law Judge Miller dismissed with prejudice the claims of Complainant against The University Cottage Club, the two parties having amicably settled their disputes between them. As part of that settlement, Cottage Club voluntarily agreed to admit women as members.
14. On June 16, 1986, Administrative Law Judge Miller rendered an Initial Decision, Partial Summary Decision, on the Issue of Liability, determining that, in view of the Division's prior decision, the clubs were places of public accommodation subject to the jurisdiction of the Division, and that the remaining respondent clubs, Ivy and Tiger, had violated the New Jersey Law Against Discrimination, *N.J.S.A. 10:5-12(f)*.
15. On July 22, 1986, Princeton University settled with Complainant her claims against the University, except for the issue of whether the University should

24. Complainant's amended complaints against Ivy and Tiger are based on her attempts to bicker at Ivy and Tiger in January 1979 (spring, junior year), September 1979 (fall, senior year), and December 1979 (spring, senior year).
25. Complainant testified that she suffered no pecuniary loss as a result of Ivy and Tiger's selection process.
26. Complainant does seek damages for emotional discomfort and pain and humiliation resulting from Ivy and Tiger's refusal to offer her membership. However, during the period of time in which complainant claims she suffered, she did not seek the aid of a physician or psychiatrist. She suffered no identifiable physical ailments caused by the emotional discomfort, pain and humiliation. She felt tense at times, she thought people were hostile to her, and she was upset. No testimony was presented that specific undergraduate members of Ivy or Tiger were rude or insulting to her except for the fact that they would not accept her as a member. The testimony does not show that undergraduate Ivy or Tiger members ever publicly humiliated complainant or that their refusal to accept her as a member was malicious. During her years at Princeton, she was treated politely and courteously by the members of Ivy. She ate at Ivy as a guest on several occasions and developed some pleasant friendships with some of the members. As a graduate, complainant returned to Princeton for reunions five times, during which a group of people chanted the name "Ivy" at her one year. At the 1985 reunion, she talked with the head of the graduate board of Ivy in a conversation which was not hostile.
27. During complainant's years at Princeton, she felt people treated her differently after she filed her lawsuit against Ivy, Tiger and Cottage, paying her more attention and treating her with more hostility. This made her feel upset because she sensed people were

trivializing what she was doing. Remarks from other unidentified people made her feel like she was standing out on campus. Some people, however, respected her and reacted favorably towards her for filing her lawsuit.

28. During complainant's spring junior year bicker attempts, the president of Ivy told her privately that she should have no false expectations of obtaining membership through bicker. She attended several bicker sessions at Ivy and spoke to Ivy members, all of whom treated her politely, but had to wait until the men were interviewed first. During bicker in the fall of complainant's senior year, complainant attended all of Ivy's bicker sessions (4 in number) and talked with Ivy members during those sessions. At spring bicker in complainant's senior year, she was told for the first time by Ivy's president that she could not attend Ivy's bicker sessions. Mr. Van Meter of Ivy testified that Ivy traditionally did not bicker seniors in the spring and, in fact, Ivy did not bicker seniors that year.
29. Complainant has returned to reunions at Princeton University five out of six years since her graduation. Nothing of significance occurred at these reunions until 1985 and 1986, when she began to receive reactions to her lawsuit from other attendees; there were both positive and negative reactions. She enjoyed the positive reactions, whereas the negative responses caused her tension and distress.
30. Complainant also returned to Princeton University on alumni days and on several occasions to speak to various groups about her lawsuit.
31. Ivy and Tiger each held a good faith belief when complainant attempted to bicker that their club was exempt from the application of the New Jersey Law Against Discrimination. This belief was initially based on their own reading of the statute. This

play a role in monitoring club compliance with any order which may be entered by the Division.

16. On July 28, 1986, Director Poff issued an Order of Partial Summary Decision affirming Administrative Law Judge Miller's June 16, 1986 Initial Decision.
17. A hearing was held before Administrative Law Judge Robert S. Miller on July 29, 30, August 1, 4 and 5, 1986 on the remaining issues of damages and remedies. At the commencement of said hearing, Cottage intervened in order to be heard on the issue of membership for Complainant.

### *Parties*

18. Sally Frank was an undergraduate student at Princeton University from September 1976 through June 1980, when she graduated. Although she characterized herself as shy in terms of meeting new people, she was active in many liberal to radical causes while attending Princeton. She participated in The Women's Center, The People's Front for the Liberation of Southeastern Africa, *Forerunner* (a liberal newspaper), a strike support committee (in support of striking food service workers), a J.P. Stevens Boycott Support group, and an anti-death penalty group. She also became well-known on campus due to her efforts to join three all-male eating clubs. After graduation, complainant attended New York University Law School. At the time of hearing, she was a clinical fellow at Antioch Law School in Washington, D.C., teaching in a landlord/tenant clinic, supervising students, and earning a master's degree in clinical teaching.
19. The Ivy Club is a social and eating club located at 43 Prospect Street in Princeton, New Jersey. It was founded in 1879 and Incorporated in 1883, pursuant to an act of the New Jersey Legislature entitled "An



Act to Incorporate Societies or Clubs for Social, Intellectual and Recreation purposes." Ivy Club is governed by its own constitution and by-laws, owns its own property, pays its own taxes, and provides its own financial support. Undergraduate membership (those who eat and socialize at the Club on a daily basis) numbers approximately 70 to 80.

20. Tiger Inn is a social and eating club located at 48 Prospect Street in Princeton, New Jersey. It was founded in 1890 and incorporated in 1892, pursuant to an act of the New Jersey Legislature entitled "An Act to Incorporate Societies or Clubs for Social, Intellectual and Recreation purposes." Tiger is governed by its own constitutional by-laws, owns its own property, pays its own taxes, and provides its own financial support.
21. Cottage, through its intervention at the hearing, is a party to this litigation only as to the issue of membership for complainant in the Club. Cottage's membership is no longer all-male. Cottage chose to become coed as part of a settlement with complainant, which also included a monetary payment to her.
22. Princeton University is a party to this matter on the sole issue of whether it should monitor Ivy and Tiger if any remedial action is ordered. Princeton is a private, nonsectarian institution of higher education founded in 1746. It admitted only male undergraduates until 1969, when it first admitted female undergraduates. It is a residential college campus.

### *Damages*

23. Complainant filed amended complaints against each of the parties, seeking "whatever relief is provided by law, including, but not limited to, compensatory damages for economic loss, humiliation, mental pain and suffering."

belief was enhanced by the Division's letter of June 7, 1979, which stated that Ivy, Tiger and Cottage were exempt from the New Jersey Law Against Discrimination because they were distinctly private. On December 9, 1981, after further investigation, the Division issued an Order stating the same. It was not until May 1985 that any determination was made by the Division that respondents were subject to the New Jersey Law Against Discrimination.

32. Many different social living and eating arrangements are available at Princeton University, from which students may choose to conduct their social lives, as, for example, on-campus dormitories, off-campus cooperatives, University meal contracts, off-campus eating, cooperative eating arrangements, nonselective clubs, selective coed clubs, and selective all-male clubs.

#### *Remedies*

33. Complainant seeks membership in Ivy, to give her opportunity for more contact with people she came to like and to get to know more people of different backgrounds. She originally sought membership to end the sexism she thought the Clubs were causing and open them to women; she also liked the idea of getting to know other people, which she felt would add to her Princeton experience. She wanted to interact with people with conservative leanings and, further, sought to change the three all-male clubs to coed clubs.
34. Ivy, Tiger and Cottage members, however, did not want to interact with complainant as a member of their clubs, nor with any other woman as a member. Based on the testimony presented, if complainant had been male, she would probably not have been asked to join either club.

35. Complainant made no attempt to join any conservative organizations on campus. She also chose not to join a nonselective club and did not receive an offer to join two coed selective clubs when she bickered in the spring of her senior year. When complainant did finally bicker at the two coed selective clubs in the spring of her senior year, only four (4) months remained of her senior year at Princeton.
36. Complainant wanted to join one of the three all-male clubs in order to get to know conservative people and further, to turn the clubs into coed eating clubs. She also opposed selective clubs and the club system itself because she felt it fractionalized the student body and created a social elite.
37. The ties which the Division has determined now exist or previously existed between Ivy and Tiger and Princeton University have been set forth in Administrative Law Judge Miller's June 16, 1986 Initial Decision, Partial Summary Decision. They are as follows:
  - (1) A major study of eating clubs was commissioned by Princeton University in 1973.
  - (2) On June 9, 1975, Princeton adopted a resolution concerning the entire "club system."
  - (3) A meal exchange program is in effect between Ivy and Tiger and the University.
  - (4) The University provided assistance to all eating clubs in such matters as coordination of information between clubs and prospective club members.
  - (5) Ivy and Tiger participate in University intramural athletic programs and activities.
  - (6) The University plows and removes snow from public sidewalks in front of the clubs.
  - (7) The University provides Ivy and Tiger with access to alumni mailing lists.

38. In its settlement with complainant, the University has agreed not to provide Ivy and Tiger with mailing lists so long as they are all-male clubs.

#### IV: PROPOSED FINDINGS OF FACT BY TIGER INN

##### *The Parties*

1. Complainant commenced her undergraduate education at Princeton University in the fall of 1976 and graduated four years later in June 1980.
2. During her years as an undergraduate, she acquired a reputation as a person interested in the public pursuit of various causes ranging from liberal to radical.
3. Among the organizations she supported by membership or by participation in public activity were the Peoples' Front for the Liberation of Southeastern Africa, a Boycott Support Group, A.C.L.U., the Women's Center, the Strike Support Committee, and the Anti-Death Penalty Group.
4. She also participated in a demonstration against William Colby, was arrested in October 1979 for sitting in on a nuclear weapons protest, and was arrested in November 1980 for blocking the entrance to the Pentagon.
5. In addition, complainant belonged to or supported at one time or another organizations whose goal was to eliminate all thirteen of the eating clubs on Prospect Street, to eliminate selectivity in the five selective clubs, and to require the three all-male clubs to offer membership to women.
6. During her first two years as an undergraduate, complainant resided, like all other freshmen and sophomores, in a dormitory; in her junior year, she belonged to a cooperative group residing on campus; and in her senior year, she belonged to a cooperative

located off-campus. Both cooperative groups supplied residence and meals.

7. Respondent Princeton University remained in the proceeding solely for the purpose of determining whether the University should be required to exercise supervision over the two respondent clubs if this tribunal ultimately requires these clubs to accept women.
8. Respondent Tiger was founded in 189[0], obtained a certificate of incorporation pursuant to the Act of Legislature in February 1892, then purchased land on Prospect Street in Princeton, New Jersey, and constructed its present clubhouse prior to 1900.
9. Tiger has its own constitution and by-laws, its own classification of membership, its own board of governors, its own admission policies, and its own tax exemption under Section 501c(7). It does not receive direct economic support from Princeton University.

### *Damages*

10. Complainant claims damages against Ivy and Tiger Inn for several different kinds of events. Specifically, she claims damages for public humiliation and harrassment, damages for the loss of a certain percentage of the value of her undergraduate education, and damages for deprivation of participation in the "old boy network" that stems from membership in the all-male clubs. Complainant claims she suffered the damages as a result of the discriminatory membership policies of Ivy and Tiger.
11. After complainant commenced her legal proceedings against the three all-male eating clubs, she gave interviews to various news media, both local and national.
12. Complainant never sought to join either of the two coeducational selective eating clubs until January of

her senior year. Even if she had been offered membership by one of these clubs, and she was not, it would have given her only three or four months of active membership.

13. Complainant never made any effort to join one of the eight nonselective, coeducational eating clubs at any time in her undergraduate life, which she could have done by merely submitting her name.
14. Complainant never sought to join or participate in any conservative activities, conservative clubs, or other conservative aspects of undergraduate life in order to exchange views and to socialize.
15. Rather than seeking to join a nonselective club, complainant chose to live and take her meals during her junior year in a small cooperative dormitory on campus, and during her senior year in a small "liberal to radical" cooperative residence off campus.
16. On the issue of denial of her entry into the "old boy network," after graduation from Princeton in 1980, complainant attended the New York University School of Law, a respected, nationally recognized law school which she selected because of its reputation for "public interest" law. She graduated from that law school very high in her class and thereafter practiced law in the public interest sector.
17. At no time did complainant seek employment with a major law firm in New York City, a law firm of any size or location engaged in general commercial practice, a national bank, an investment banking firm, or any major corporation; a corporate career was "anathema" to her.

#### *Offer Of Membership*

18. Complainant demands an offer of membership from Ivy, Tiger and Cottage. Complainant claims that only because she was a woman, she did not become



a member of one of the all-male clubs. Respondent clubs argue that, regardless of the outcome on the issue of remedies in general, they should not be required to extend offers of membership to complainant because she did **not** genuinely wish to be a member of any of the three.

19. Complainant submitted her own testimony and the testimony of others that she was a friendly person, who was willing and able to converse on diverse subjects with persons of strongly differing views. She further testified that she genuinely wanted to be a member of any one of the three clubs. Membership, however, is not determined by the desires of a candidate for membership but rather on the application of the selection criteria of the respondent clubs.
20. Leaving aside their policies on the admission of women, the three respondent clubs have been for their entire history selective in their membership practices.
21. The typical undergraduate member of Tiger is described as a "broad-shouldered athlete." The candidate most likely to be given an offer of membership to Tiger is a person with leadership and athletic abilities and "a sincere care and respect for Tiger Inn."

#### V: PROPOSED FINDINGS OF FACT BY COTTAGE CLUB

1. Cottage no longer practices sexual discrimination. It admitted women to membership in the bicker conducted during the winter of 1985-1986, and plans to continue to admit to membership both female and male undergraduates of Princeton University.
2. Cottage is, however, a selective club, which means that both female and male undergraduate students at Princeton University may bicker there; membership is

not, and never has been, offered to all who bicker or apply for membership.

3. If Cottage were ordered to make an offer of membership to complainant, such order would contravene its longstanding practice of selectivity.
4. Following the February 1986 bicker and admission of female members to the Club, Cottage entered into a Stipulation of Settlement dated February 17, 1986, with Complainant.
5. With the exception of an offer of membership to complainant, a matter still in dispute, Cottage has satisfied its obligation to complainant by paying her damages and counsel fees pursuant to the Stipulation of February 17, 1986.
6. Under existing Cottage policies and practices, becoming an undergraduate member requires at least 80% approval from the undergraduates in the club at the time. Associate membership, as a graduate, requires unanimous approval of the Board of Governors and substantially unanimous approval of the applicant's class, as well as the adjacent classes before and after his or her class.

## ISSUES AND ANALYSIS OF LAW

### *I. Damages*

#### *A. General Principles*

Complainant admits that she suffered no pecuniary loss as a result of her failure to be admitted to Ivy, Tiger and Cottage, and thus does not demand damages in that respect. Rather, she seeks an unspecified sum of money as compensation for the mental and emotional distress, pain and suffering that she sustained as a result of respondents' unlawful discriminatory policies and practices.

The applicable section of the New Jersey Law Against Discrimination is *N.J.S.A. 10:5-17*, which reads as follows:

If, upon all evidence at the hearing, the director shall find that the respondent has engaged in any unlawful employment practice or unlawful discrimination as defined in this act, the director shall state his findings of fact and conclusions of law and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful employment practice or unlawful discrimination and to take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, or restoration to membership, in any respondent labor organization, or extending full and equal accommodations, advantages, facilities, and privileges to all persons, as, in the judgment of the director, will effectuate the purpose of this act, and including a requirement for report of the manner of compliance. . . .

Although this section does not specifically empower the Director to award monetary damages, her right to do so was first recognized by the Supreme Court in *Zahorian v. Russell Fitt Real Estate Agency*, 62 N.J. 399 (1973). There, the court extensively reviewed and analyzed case law in New Jersey and elsewhere, and held that the Director has authority to award monetary damages for pain and suffering as "incidental"—but not primary—relief under the Law Against Discrimination. In upholding an award of \$750 to a complainant who had suffered discrimination on account of her sex and marital status (unmarried) in the rental of an apartment, the court said:

. . . while the Legislature contemplated that the Director would have authority to award compensatory damages for pain and suffering as well as economic loss, his authority would be confined to an award which truly constituted *only 'incidental relief,'* rather than a primary item. (emphasis supplied, citations omitted) *Id.* at 413

The dual purpose of awarding damages in an action under the New Jersey Law Against Discrimination is to make the

A tortfeasor is usually held liable for the injuries which result in the ordinary course of events from his negligence, and it is sufficient if his negligent conduct was a substantial factor in bringing about the injuries. *Rappaport v. Nichols* at 203. Sometimes, however, the consequence of a defendant's negligence is simply too remote from his conduct to allow recovery for them. *Robinson v. Gonzalez*, 213 N.J. Super. 364, 371 (App. Div. 1986); see also, *Caputza v. The Lindsay Co.*, 48 N.J. 69 (1966).

Ultimately, the imposition of a duty, and hence of liability, depends upon policy considerations, such as the effects of the imposition of the risks and burdens of a particular activity. *McGlynn v. Newark Parking Authority*, 86 N.J. 551, 560 (1981). Although "foreseeability" was an important factor in the landmark case of *Kelly v. Gwinnell*, 96 N.J. 538, 544 (1984) (liability to third persons imposed on a social host who provided intoxicating liquor to his guest), the Supreme Court observed that in some cases, "more" was involved. The Court declared:

In fact, however, more is needed, 'more' being the value judgment, based on an analysis of public policy, that the actor owed the injured party a duty of reasonable care. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). In *Goldberg v. Housing Auth. of Newark*, 38 N.J. 578, 583 (1962), this Court explained that 'whether a duty exists is ultimately a question of fairness. The inquiry involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution.' See also *Portee v. Jaffee*, 84 N.J. 88, 101 (1980) (whether liability for negligently inflicted emotional harm should be expanded depends 'ultimately' on balancing of conflicting interests involved). *Id.* at 544.

As Judge Greenberg observed in his scholarly analysis in *Robinson v. Gonzalez*, *supra*, although it is true that liability of defendants for losses caused by their conduct has been expanding, "there are limits." *Id.* at 370. Sometimes the lia-

bility is limited by a finding of no duty, while at other times it is limited because of policy reasons. *Ibid.* A determination of "proximate cause" is based "upon mixed considerations of logic, common sense, justice, policy and precedent." *Caputza v. The Lindsay Co.*, at 77-78.

The necessity for imposing limits was explained in *People Exp. Airlines, Inc. v. Consolidated Rail.*, 100 N.J. 246, 252-53 (1985):

The assertion of unbounded liability is not unique to cases involving negligently caused economic loss without physical harm.

Even in negligence suits in which plaintiffs have sustained physical harm, the courts have recognized that a tortfeasor is not necessarily liable for *all* consequences of his conduct. While a lone act can cause a finite amount of physical harm, that harm may be great and very remote in its final consequences. A single overturned lantern may burn Chicago. Some limitation is required; that limitation is the rule that a tortfeasor is liable only for that harm that he proximately caused. Proximate or legal cause has traditionally functioned to limit liability for negligent conduct. Duty has also been narrowly defined to limit liability. (emphasis in original)

Thus, in addition to precedent, we must consider such abstract, but vital, matters as "logic," "common sense," "justice" and "policy."

Undeniably, New Jersey has a strong public policy of discouraging and eradicating, insofar as possible, the "cancer of discrimination" in public life. *Jackson v. Concord Company*, 54 N.J. 113, 128 (1969). The legislature, however, did not intend to make all forms of discrimination illegal. See, for example, *Peper v. Princeton University Board of Trustees*, 77 N.J. 55, 68 (1978); *Trautwein v. Harbourt*, 40 N.J. Super. 247, 267 (App. Div. 1956). The statutory exemption for "distinctly private" organizations is designed to protect the personal associational preferences of their members. *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 25, 34 (1966). Fur-



thermore, the related rights of privacy and freedom of association are also recognized, valued and protected in our society. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also, the dissenting opinion of Justice Douglas in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), wherein he stated (at 179-180):

My view of the First Amendment and the related guarantees of the Bill of Rights is that they create a zone of privacy which precludes government from interfering with private clubs or groups. The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires. So the fact that the Moose Lodge allows only Caucasians to join or come as guests is constitutionally irrelevant, as is the decision of the Black Muslims to admit to their services only members of their race.

Much like beauty, the concepts of "justice," "common sense," and "fairness" are in the eye of the beholder. In my opinion, these values, in the present context, would not be served by holding Ivy and Tiger liable for insulting remarks and expressions made by third parties five or six years after the unlawful acts of discrimination complained of. Furthermore, I am unaware of any cases, either in New Jersey or elsewhere, stretching liability so far.

Rather, it seems fair, logical and reasonable to limit the liability of Ivy and Tiger to the period of time that complainant was an undergraduate student at Princeton. Then, as a resident at the University, she was part of a relatively small community; her ability to avoid the "slings and arrows" hurled at her was limited; and the hurt which she felt was much closer temporally to the acts of discrimination, must have been felt more keenly, and was more easily foreseeable



by respondents.\* In any event, respondents' liability must end at some point in time. It cannot continue forever.

### *C. Amount of Damages*

Having decided that complainant can look for compensation for pain and suffering only until June 1980, the question becomes: How much money is appropriate, just and fair to compensate complainant for the mental pain and suffering she sustained till that time and, further, to deter invidious discrimination on the part of similarly situated clubs and organizations?

To answer this question, one should review prior New Jersey civil rights cases wherein monetary damages were awarded, with particular emphasis on those involving sexual discrimination.

The officially reported judicial cases are:

1. *Gray v. Serruto Builders, Inc.*, 110 N.J. Super. 297 (Chan. Div. 1970) (\$500 damages awarded for racial discrimination).
2. *Zahorian v. Russell Fitt Real Estate Agency*, 62 N.J. 399 (1973) (\$750 awarded for sexual discrimination in renting).
3. *Harvard v. Bushberg Bros.*, 137 N.J. Super. 537 (App. Div. 1975) (\$1000 for denial of promotion on account of sex).
4. *Flanders v. William Paterson College of New Jersey*, 163 N.J. Super. 225 (App. Div. 1976) (\$500 for sexual discrimination).
5. *Director, Division on Civil Rights v. Slumber, Inc.*, 166 N.J. Super. 95 (App. Div. 1979), *modif.* 82 N.J.

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\* One doubts if the extensive and prominent media coverage of the instant case during the past 18 months was reasonably foreseeable in 1979 and 1980. Without such coverage, it is unlikely that Ms. Frank's presence at the 1985 and 1986 reunions would have been as visible and controversial or the reaction as adverse.

injured party whole and to discourage and deter discriminatory conduct in the future. *Goodman v. London Metals Exchange*, 86 N.J. 19, 34-35 (1981) (holding that unlawful sexual discrimination had been proven but that discriminatee had duty to mitigate damages). An award of damages for pain and suffering should be supported by the complainant's testimony and the resultant findings of the Director. *Rogers v. Campbell Foundry Co.*, 185 N.J. Super. 109, 113 (App. Div. 1982). A monetary award for emotional distress will be upheld where the extrinsic evidence supports complainant's contention that she was emotionally affected by the unlawful discriminatory conduct. *Andersen v. Exxon Co.*, 89 N.J. 483 (1982). But, where there is no genuine basis for any feeling of humiliation or mental distress on complainant's part, or where the evidence for such is "nebulous," no monetary compensation can be awarded. *Castellano v. Linden Board of Education*, 79 N.J. 407 (1979).

#### *B. Proximate Cause*

Complainant claims that respondents should be liable, not only for the pain and suffering caused immediately by her exclusion from the clubs and while she was an undergraduate at Princeton, but also for the pain and suffering remotely caused by the unlawful exclusion, *i.e.*, for the insults, taunts, and verbal and visual assaults to which she was subjected during the 1985 and 1986 college reunions that she attended. Respondents answer that complainant's alleged hurt and embarrassment at her exclusion is not genuine, that she presented no evidence of slight or insult to her by any particular member or members, and that in any event they cannot be held liable for any tortious or criminal acts of third persons over whom they have no control and which occurred years after the alleged unlawful discrimination.

Strictly speaking, an action for damages under the Law Against Discrimination sounds neither in contract nor in tort. Such an action was not recognized at common law. It is, rather, a statutory remedy. Thus, when it comes to the ques-

tion of "proximate cause," one must seek guidance in existing case law and/or in legislative history. Unfortunately, however, research reveals no cases or legislative history dealing with "proximate cause" in the civil rights area. At least in this context, therefore, the instant case is novel.

Because complainant seeks damages for pain and suffering, mental anguish and emotional distress, and because such relief typically is sought in tort actions, the tort analogy seems most apt, and it is to tort law that one must look first.

Duties enforceable in tort actions are defined and limited by the concept of "reasonable foreseeability." A duty arises to take some action if harm to another person is reasonably foreseeable if that action is not taken, or to refrain from taking some action if harm to another is reasonably foreseeable if that action is taken. *Foreign Auto Prep. Service Inc. v. Vicon Constr. Co.*, 193 N.J. Super. 420, 423 (App. Div. 1984). Negligence—like most other kinds of tort—is tested by whether the reasonably prudent person at the time and place should recognize and foresee an unreasonable risk or likelihood of harm or danger to others. *Rappaport v. Nichols*, 31 N.J. 188, 201 (1959).

If the reasonably prudent person would foresee danger resulting from another's voluntary, or even criminal, acts, the fact that the other's actions are beyond defendant's control does not preclude liability. *Trentacost v. Brussel*, 82 N.J. 214, 222 (1980). Foreseeability of harm, not the fact of another person's intervention, is the crucial factor in determining whether a duty exists to take measures to guard against criminal activity. *Goldberg v. Newark Housing Auth.*, 38 N.J. 578, 583 (1962). The criminality of the activity is only one circumstance in the possible foreseeability of harm. *Genovay v. Fox*, 50 N.J. Super. 538, 551 (App. Div. 1958), rev'd. on other grounds, 29 N.J. 436 (1959). If the loss to a plaintiff is a foreseeable consequence of a defendant's neglect, the defendant cannot exculpate himself on the theory that the harm was not "the proximate cause" of that neglect. *Braitman v. Overlook Terrace Corp.*, 68 N.J. 368, 382 (1975).

412 (1980) (\$1500 for pain and humiliation suffered by four identified but unnamed parties).

6. *Andersen v. Exxon Co.*, 89 N.J. 483 (1982) (\$500 for employment discrimination).
7. *Rogers v. Campbell Foundry Co.*, 185 N.J. Super. 109 (App. Div. 1982) (\$750 for employment discrimination).

Counsel have brought to my attention several other cases decided by the Director but either not appealed or not yet decided by an appellate court, wherein more substantial sums were awarded for pain and suffering. These are:

1. *Roberts, et al. v. Keansburg Bd. of Ed.*, 5 N.J.A.R. 208 (1983) (complainant awarded \$2500 for constant and flagrant sexual harassment, including degrading comments).
2. *Scaravelloni v. Butterfield Enterprises, Inc.*, 8 N.J.A.R. 89 (1984) (\$5000 awarded to handicapped person; "arrogance" and poor attitude of respondents cited).
3. *Wobert v. Stylianos*, OAL Dkt. No. CRT 1052-85 (decided November 15, 1985) (\$7500 for sexual harassment; respondent's conduct termed "egregious and obnoxious.").
4. *Wilner v. Diet Institute, Inc.*, OAL Dkt. No. CRT 7969-85 (decided September 11, 1986) (\$5000 awarded for continuing pain and suffering experienced by female as result of extreme, egregious and serious sexual harrassment at work).

With respect to the approximately three years (from 1978 to 1980) when she was excluded from consideration for membership solely on account of her sex, complainant testified—and I found her testimony credible—as follows:

*In her junior year she was made to feel very "uncomfortable" when she attended bicker at Ivy because she had to stand around and wait until all the men had first been inter-*

viewed. She was further "upset" when informed by Tiger officers that she could not attend bicker at their club. After she informed the president of Ivy that she intended to file a civil rights complaint, the "general attitude" toward her on the campus changed for the worse, viz., there was an increase in hostile and insulting remarks, and she felt more isolated and uncomfortable.

*In complainant's senior year*, she was also insulted at times. She was widely perceived simply as an activist, rather than as a person with feelings and needs. This made her feel uncomfortable and isolated.

On cross-examination, Ms. Frank admitted: (1) she knew in advance that both respondents were highly selective and that even a male had no assurances of being admitted; (2) during her attempts to bicker at respondent clubs she was treated politely and courteously and, other than her exclusion from membership, no hostile acts were directed at her; (3) she ate, as a guest, at both clubs on several occasions—2 to 10 times at Ivy and approximately 5 times at Tiger—and was treated courteously on each occasion; (4) aside from her attempts to "co-educate" the all-male clubs, she may have been known on campus for her involvement in various controversial causes, protests and demonstrations (both on and off campus); (5) she suffered no *physical* pain or discomfort; (6) she neither consulted nor sought help from any medical doctor or psychiatrist; (7) she was able to establish friendships with some members of Ivy; and (8) she developed genuine feelings of warmth and affection for some members of Tiger.

There is no doubt that complainant is a highly principled and intelligent young woman. She appears to have normal sensitivity to slights and insults and she must have felt hurt and diminished by the mere fact of exclusion from membership consideration simply on account of her sex. Additionally, it is easily understandable that she would be upset and hurt by hostile and insulting remarks directed at her by some of her classmates and peers on account of her efforts to "co-educate" the clubs. For all of this, she is entitled to monetary compensation.



On the other side of the scale, however, and also to be taken into account are: (1) respondents' good faith belief that they were acting legally, *Castellano v. Linden Board of Education*, 79 N.J. 407 (1979); *Guardians Ass'n of New York City v. Civil Service Commission*, 630 F.2d 79, 112 (1980); (2) complainant's foreknowledge of respondents' males-only policy, *Castellano v. Linden Board of Education*; and (3) the generally polite and courteous treatment that she received from the individual members of the clubs. Cf., the flagrant, extreme, egregious, arrogant and obnoxious behavior and attitudes of respondents in *Roberts v. Keansburg*, *Scaravello v. Butterfield Enterprises, Inc.*, *Wolbert v. Stylianos*, and *Wilner v. Diet Institute*.

In considering the imposition of a monetary award for deterrence purposes, one must recognize the following: this is a novel case; it is far from clear whether the Legislature intended eating clubs, fraternities and sororities to be brought within the ambit of the law; and no appellate court has yet ruled on the merits of the case. Thus, one must proceed cautiously.

Taking into account and carefully considering all of the above factors, I am of the opinion that \$2500 is a fair, proper and reasonable sum to compensate complainant for the pain and suffering she sustained through June 1980 as a result of Ivy's and Tiger's exclusionary practices, and that Ivy and Tiger should be jointly and severally liable to her in that amount.

#### OFFER OF MEMBERSHIP

N.J.S.A. 10:5-17 gives the Director broad discretion in fashioning a remedy after a finding that an illegal act or practice of discrimination has occurred. Both the statutory language itself and the judicial construction given to that language leave little doubt that in the instant case the Director could require respondent clubs to offer complainant membership. See, e.g., *Zahorian v. Russell Fitt Real Estate Agency*, *supra*; *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 25



(1966); *Talman v. Board of Trustees of Burlington County College*, 169 N.J. Super. 535 (App. Div. 1979); and *National Organization for Women, Essex County Chapter v. Little League Baseball, Inc.*, 127 N.J. Super. 522 (App. Div. 1974), aff'd. 67 N.J. 320 (1974).

For the reasons which follow, however, I do not believe this remedy is either appropriate or desirable.

First, complainant's personality, abilities, interests, philosophy, and talents do not come close to those of the majority of the membership of the clubs. Politically, philosophically and socially she is on the left side of the spectrum, whereas most of the club members are in the middle or on the right. Furthermore, while complainant cares little or not at all about participation in sports, many, if not most, of respondents' members are athletically inclined and active. Complainant, moreover, is opposed to the club system itself, feeling that it breeds elitism and fractionalizes the student body; the members of respondent clubs, on the other hand, are supporters and advocates of the system. In short, compelling the clubs to make complainant a member would be like trying to mix oil and water.

Second, although respondent clubs illegally discriminated against complainant by totally excluding women from membership, the Law Against Discrimination still permits them to be "selective," i.e., to pick and choose their membership on the basis of such non-ethnic, non-sexual and non-racial criteria as compatibility of interests, abilities, philosophy, and personality. As noted above, complainant and the majority of respondents' members are simply not compatible. Clearly, even if Ms. Frank had been male, her chances of having been accepted to membership in any of the three clubs were slim indeed. Thus, to require that she be given membership in any one of the three would not make her "whole," or restore her to her "rightful place," a theory favored by many courts, especially in employment discrimination cases. See, *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Terry v. Mercer County Board of Chosen Freeholders*, 86 N.J. 141, 156-7 (1981); and *Director, Division on Civil Rights v. Slum-*

Title IX of the Civil Rights Act (prohibiting discrimination on the basis of sex in federally funded institutions) for social fraternities and sororities. 20 U.S.C. §1681(a)(6) (1978). The chief sponsor of Title IX, Senator Birch Bayh of Indiana, in supporting the exemption, declared:

Fraternities and sororities have been a tradition in the country for over 200 years. Greek organizations, much like the single sex college, must not be destroyed in a misdirected effort to apply Title IX. 120 *Cong. Rec.* 39992 (1974) (statement of Senator Bayh).

In short, Congress has plainly expressed its intention to exclude CSO's from the reach of federal anti-discrimination legislation. Although the New Jersey Legislature has not expressed itself so explicitly, it is not unreasonable to suppose that, for reasons similar to those stated by Senator Bayh, it may also have intended to exempt fraternities, sororities and other CSO's.

As I have indicated earlier, moreover, this is not simply a case of good versus evil. Rather, at the heart of the case is a conflict between two profound claims of right. *Cornelius v. B.P.O.E.*, 382 F. Supp. 1182 (D.C. Conn. 1974). As strongly as complainant feels about the evils of sexual discrimination, so do respondents about their rights of privacy and association. These rights, although not specifically mentioned in the text of the United States Constitution, are essential to our system of ordered liberty. In *Roberts v. United States Jaycees*, 468 U.S. 609, 618-619 (1984), the Supreme Court declared:

The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary for unjustified interference by the State. Without precisely identifying every consideration that may underlie this type of constitutional protection, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation

by cultivating and transmitting shared ideas and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State. Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. *Protecting these relationships from unwarranted state interference therefore is central to any concept of liberty.* (emphasis supplied, citations omitted)

New Jersey, too, has long recognized the importance of freedom of association in our society. In *Trautwein v. Harbourt*, 40 N.J. Super. 247, 267 (App. Div. 1956) (no liability for wrongful exclusion of applicant for membership in private fraternal organization), the court noted that private organizations generally have the "unquestionable right to exclude from membership on any basis whatever," the reason being:

Fraternal association implies a degree of social intimacy but one step removed from that of the family. So long as this form of social organism remains as deeply imbedded in our culture as it is now, *the law must respect it and its ordinary concomitants, chief among which is selectivity of membership.* (emphasis supplied) *Ibid.*

Other New Jersey cases affirming this principle include: *Brunson v. Rutherford Lodge No. 547, B.P.O.E.*, 128 N.J. Super. 66, 79-82 (Law Div. 1974) (a private club is not subject to the Law Against Discrimination), and *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 25, 34 (the statutory exemption for "distinctly private" organizations "is designed to protect the personal associational preferences of their members"). Among other applicable federal and foreign state cases are: *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (lodge can constitutionally refuse service to blacks even though it obtains liquor license from state); *Kiwanis International v. Ridgewood Kiwanis*, \_\_\_\_ F.2d \_\_\_\_ (C.A. 3, 1986)

*ber, Inc.*, 166 N.J. Super. 95, 108 (App. Div. 1979), *modif.* 82 N.J. 412 (1980).

Third, the law does not favor the retroactive imposition of new standards of membership, *Hebard v. Basking Ridge Fire Co., No. 1*, 164 N.J. Super. 77 (App. Div. 1978), *certif. den.* 81 N.J. 294 (1979), nor a remedy which in fact creates a form of reverse discrimination. *Flanders v. William Paterson College of N.J.*, 163 N.J. Super. 225 (App. Div. 1978). To do that, or to create a sinecure for a person who has been offended by an act of discrimination, would "profane" the estimable policy and purpose of the law. *Talman v. Board of Trustees* at 540.

Finally, I was not impressed by complainant's assertion that her interest in joining respondent clubs was sincere and genuine and motivated by her desire to make friends with more conservative students. If so, why did she not avail herself of any of the numerous other opportunities to join conservative organizations and clubs? In my judgment, Ms. Frank's claim in this regard was the weakest part of her case.

In short, I am of the opinion that the beneficial and worthy purposes of the Law Against Discrimination would not be advanced by requiring an offer of membership to Ms. Frank, and, accordingly, that the Director should exercise her discretion in this respect in favor of the clubs.

#### CHOICE OF REMEDY: SEVERANCE OF TIES OR SEXUAL INTEGRATION

As noted at the outset, the last major issue in this matter is whether respondent clubs should be required to admit women to membership, or, alternatively, whether they should be ordered to sever the ties that connect them to Princeton University\* and thereby revert to the status of a "distinctly pri-

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\* The ties which the Director has found to constitute a "symbiotic relationship" include: (1) the University commissioned a major study of the clubs during the period from 1973-1975; (2) the University adopted a resolu-

vate" organization exempt from the New Jersey Law Against Discrimination. Complainant urges the former, respondents the latter. For the reasons which follow, I am of the opinion that the latter alternative is the better choice.

The Law Against Discrimination does not attempt to be all-inclusive. There are several important exemptions. In defining the phrase "place of public accommodation," *N.J.S.A.* 10:5-5(1) declares that it shall *not* "apply to any institution, bona fide club, or place of accommodation, which is in its nature distinctly private."

To my knowledge, there is no New Jersey legislative history indicating whether the Legislature intended fraternities, sororities and other college social organizations like respondents to be exempt from the Law Against Discrimination. Nor is there any New Jersey case law on the subject. Thus, in this respect, also, the instant case is novel.

Absent any applicable legislative history or case law, it is appropriate to refer to federal cases and federal legislative history for guidance and instruction. *Terry v. Mercer County Board of Chosen Freeholders*, 86 *N.J.* 141, 154 (1981).

The federal anti-discrimination statutes recognize specific exemptions for private clubs and college social organizations ("CSO's"). A 1964 amendment to the 1957 Civil Rights Act exempts membership practices of CSO's from investigations by the Civil Rights Commission, 42 *U.S.C.* §1975c(b) (1981). The Waggoner Amendment modifying the 1964 Civil Rights Act preserves the right of college students to associate privately, 20 *U.S.C.* §1144(b) (1978). Furthermore, in 1974, Congress provided an exemption from the requirements of

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tion on June 9, 1975 affirming the value and importance of the club system to Princeton; (3) a meal exchange program between the clubs and the University was put into effect; (4) the University assisted the clubs by providing information on prospective club members; (5) the clubs participated in University-sponsored intramural athletic programs and activities; (6) the University plowed the snow in front of club property; and (7) the University provided access to alumni mailing lists to the clubs. In addition, the University has mentioned and described the existence of the three respondent clubs in various official publications, referring to them as important social and dining options at Princeton.



(local club exempt from New Jersey Law Against Discrimination because it is "distinctly private"); *Junior Chamber of Commerce, Rochester v. United States Jaycees*, 495 F.2d 883 (C.A. 10, 1974) (bylaw of United States Jaycees which limited membership to males did not infringe constitutional rights of females); *Wright v. The Cork Club*, 315 F. Supp. 1143 (D.C. Tex. 1970) (allegedly "private club" could not deny membership to blacks because club in reality was "a place of public accommodation, a commercial venture"); *Solomon v. Miami Woman's Club*, 359 F. Supp. 41 (S.D. Fla. 1973) (private all-white club may exclude blacks); *Cornelius v. B.P.O.E., supra* (fraternal organization held to be private club within exemption of state anti-discrimination law); and *Kiwanis Club of Great Neck v. Kiwanis International*, 383 N.Y.S. 2d 383, 52 A.D. 2d 906 (App. Div. 1976) (club not subject to fifth and fourteenth Amendments or to Civil Rights Act, and discriminatory membership practice did not violate the Human Rights Law of New York).

In his concurring opinion in *Bell v. Maryland*, 378 U.S. 226, 313 (1964), Justice Goldberg succinctly made the point:

Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of his personal prejudices, including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

*See also, Norwood v. Harrison*, 413 U.S. 455 (1973), wherein it was held that the lending of textbooks by the State of Mississippi to children attending private, racially segregated schools is unconstitutional. The court nevertheless noted that "private [racial] bias is not barred by the Constitution, nor does it invoke any sanction of laws. . . ." *Id.* at 469.

In other words, under the United States Constitution, if a group of female students, black students, Hispanic students or Jewish students desired to establish an exclusive ("discriminatory") eating club near the campus of Princeton University, they are permitted to do so. Male students have no less



a right. Unlike the inhabitants of Orwell's *Animal Farm*, in this country no group is "more equal" than any other.

A scholarly analysis of the instant case recently appeared in 4 *Yale and Policy Review* 426 (1986). In an article entitled "Freedom of Association: the Attack on Single-Sex College Social Organizations," the author sets forth a number of important policy reasons for exempting single-sex CSO's from state anti-discrimination laws. These reasons include freedom of association, tradition, pluralism and diversity. It was cogently noted:

Students must have the opportunity to leave the university context to exercise that right of privacy, including the right to associate freely with their peers. Simply by virtue of their enrollment in a university, a group of men or women should not forfeit rights of association that they would otherwise enjoy. When the state moves outside of matters controlled by a university to regulate students' lives in a way that it could not regulate non-students' lives, its interest becomes far less compelling.

Finally, it is essential to recognize that the only reason respondent clubs have been held subject to the Law Against Discrimination is their "symbiotic relationship" with Princeton. Were it not for that, I, and presumably the Director, would have been required to declare them exempt under the "distinctly private" section of the law, inasmuch as the clubs meet the usual criteria—size, selectivity, nonprofit status, and limitation of facilities to members and guests—of a "private club." *Wright v. The Cork Club, supra*; *Kiwanis International v. Ridgewood Kiwanis, supra*; and see, Note, 30 *Mont. L. Rev.* 47, 58 (1968).

It seems to me inappropriate, if not unreasonable, to compel the clubs to maintain their symbiotic ties and to retain a status which the law would otherwise not require, especially when respondents have a feasible way of severing those ties. As stated in *Trautwein v. Harbourt, supra*, so long as fraternal organizations remain deeply imbedded in our culture, the law must respect them and their "ordinary concomitants,

chief among which is selectivity of membership." 40 *N.J. Super.* at 267. To do as complainant seeks would, in effect, forbid respondents from changing their relationship with Princeton and from assuming the legal status of a private club. This would constitute a relatively harsh and unprecedented measure and would also run counter to a fundamental principle, viz., that of choosing the least intrusive and burdensome remedy necessary to correct the wrong. Among the reasons for this principle is the practical one of conservation of scarce public resources. See, *In re Kallen*, 92 *N.J.* 14, 21, 31 (1983).

It bears repeating, moreover, that the conduct of the clubs does not constitute a clear and flagrant case of illegality. Neither side possesses the holy grail. Rather, the case involves conflicting policy and values which are important to all parties. As such, it is morally, philosophically and practically fitting that the amount of governmental coercion involved should be no greater than necessary. In constitutional adjudication, equitable remedies are a special blend of what is necessary, what is fair and what is workable. *Cornelius v. B.P.O.E.*, 382 *F. Supp.* at 1192. In equity especially, courts avoid rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests. *Ibid.* More often than not, the resolution of constitutional disputes is accomplished not by the application of absolute rules but by a sensitive balancing process. *Wright v. the Cork Club*, *supra*. While the cause of integration is certainly a laudable one, to allow the government to intrude into essentially private affairs, even in the name of integration, would work a greater injustice to all citizens, no matter what their sex, race, creed or religion. *Id.* at 1157. See also, *Guardians Association of New York City v. Civil Serv.*, 630 *F.2d* 79 (C.A. 2, 1980), an employment discrimination suit, wherein the court found that respondents' failure to develop a valid test for hiring of minorities was not wilful and did not justify a harsher remedy based upon a case of deliberately illegal discrimination.

Complainant argues that a remedial order allowing the clubs to break their ties with Princeton "runs afoul of the

public's interest in 'eradicating the cancer of discrimination.' Indeed, its very purpose would be to allow Ivy and Tiger, who have been adjudged wrongdoers, to circumvent the law and continue to discriminate against a substantial segment of Princeton's student body simply because they are women." The answer to this argument is that the law does not consider *all* forms of discrimination to be malignant. Rather, it is only "invidious" discrimination that is proscribed. *See, Norwood v. Harrison*, 413 U.S. 455, 470 (1973). As noted in the cases cited above, some kinds of discrimination in some contexts are at least permitted, if not approved.

Furthermore, neither the courts nor administrative agencies can ignore express statutory language (or the legislative intention underlying it). *See, Peper v. Princeton University Board of Trustees*, 77 N.J. 55, 68 (1978) (Law Against Discrimination applies to Princeton University as an "educator" but not as an "employer") wherein, referring to the exemption section of the law, the court said:

A construction of a legislative enactment which would render any part thereof superfluous is disfavored. . . . Moreover, despite the expansive general purpose of the Law Against Discrimination, . . . *this Court may not ignore the plain meaning of the exemption* of private educational institutions found in N.J.S.A. 10:5-5(e). . . .

While this Court has been scrupulous in its insistence that the Law Against Discrimination be applied to the full extent of its facial coverage, . . . it has never found such coverage to exist in the face of an unambiguous exclusion. (emphasis supplied, citations omitted)

Complainant contends further that because the relationship between the University and the clubs includes important intangible bonds,\* the ties between them cannot practically

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\* Complainant does not elaborate on the intangibles. Presumably, she refers to the history, the traditions, and the image of the clubs, and to what Lincoln called "the mystic chords of memory," as well as to the geographical proximity of the clubs to the University campus.

be broken. It was, however, not these intangible bonds that brought the clubs within the law's ambit. It was, rather, such concrete and practical arrangements as the meal-exchange program. The "intangibles" in life are often significant, even vital, but there are bounds beyond which the government should not and cannot go. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (privacy of marriage); *Katz v. United States*, 389 U.S. 347 (1967) (privacy of conversations); *Mapp v. Ohio*, 367 U.S. 643 (1961) (privacy of home); and *NAACP v. Alabama*, 357 U.S. 449 (1958) (privacy of association). If those tangible ties can be severed, I see no compelling reason to forbid it.\*

Finally, Ms. Frank asserts that even if the ties were terminated, the clubs' discriminatory activities "would continue to injure women students at Princeton. The all-male clubs make those women who are at Princeton feel there are places in which they do not belong. . . . Additionally, the sexist and demeaning behavior of at least some Ivy and Tiger members is exacerbated by their spending time with their fellow club members." One can freely acknowledge the moral force of complainant's argument: sexual discrimination is not only wrong *per se*, it is all the more reprehensible if it encourages the separate evil of sexism. But while the scope of legal duty has expanded in recent years in obedience to the urging of morality, "the law does not compel active benevolence between man and man. It is left to one's conscience whether he shall be the good Samaritan or not." Courts sit in legal, not moral judgment. *Cornelius v. B.P.O.E.* at 1187.

In holding that respondents may become exempt from the law by severing their tangible connections with Princeton, one does not condone the restrictive practices of the clubs. I yield to no one in my opposition to prejudice, sexism and invidious discrimination. In matters of this kind, however, personal predilections cannot be allowed to control the decision. *Kiwanis International v. Ridgewood Kiwanis Club*, *supra*. Rather, the decision turns on a careful balancing of

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\* One of the ties has already been severed. As part of its settlement with complainant, the University has agreed not to provide the clubs with access to its alumni mailing list.

the factors discussed above. In this case and in this context, the balance tips in favor of respondents.

### THE UNIVERSITY'S ROLE

Having decided that respondent clubs should not be required to admit women to membership, it is unnecessary to decide what rôle, particularly as a monitor, Princeton should play in the imposition of an affirmative action plan. The question becomes moot, and I express no opinion on it here, except to reiterate the understanding that the University will fully, fairly and completely do its part in severing past connections with the clubs and avoiding future ones.

### CONCLUSION AND ORDER

For the reasons expressed above, I CONCLUDE that respondent clubs should pay the complainant, by way of compensatory damages, the sum of \$2,500 (for which they shall be jointly and severally liable). I further CONCLUDE that respondent clubs and Princeton University should promptly and completely sever the ties mentioned above insofar as they have not already done so. I further CONCLUDE that Princeton University should avoid reference to respondent clubs as being affiliated or connected with the University in any way in all its future publications, and that respondent clubs should likewise avoid claiming any present legal relationship with Princeton University. It is so ORDERED.

This recommended decision may be affirmed, modified or rejected by the DIRECTOR OF THE DIVISION ON CIVIL RIGHTS, PAMELA POFF, who by law is empowered to make a final decision in this matter. However, if Pamela Poff does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

I hereby FILE my Initial Decision with PAMELA POFF for consideration.

January 28, 1987

DATE

/s/ ROBERT S. MILLER

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

January 29, 1987

DATE

/s/ [ILLEGIBLE]

DIVISION ON CIVIL RIGHTS

Mailed to Parties:

January 30, 1987

DATE

/s/ RONALD I. PARKER

OFFICE OF ADMINISTRATIVE LAW

ij/ee



## EXHIBITS

On behalf of complainant:

- C-1 Picture from Reunions, 1985
- C-2 T-Shirt
- C-3 Electrolysis Ad, Daily Princetonian, 1/16/84
- C-4 Questioning the Real Motivation of Sally Frank, Daily Princetonian, 11/25/85
- C-5 In Defense of Elitism, Prospect Magazine
- C-6 "Move on all-male clubs" . . . Daily Princetonian
- C-7 Princeton Admissions Information, 1975-76 (2 pages)
- C-8 Princeton Admissions Information, 1981-82
- C-9 Student Guide to Princeton, 1978-79
- C-10 Choices '82 (3 pages)
- C-11 Nicholas Donatiello Affidavit (3 pages)
- C-12 Report on Residential Life Princeton University 1974
- C-13 Choices 82 (3 pages)
- C-14 Herbert Hobler letter, 11/2/82
- C-15 The Clubs are part of Princeton, Daily Princetonian
- C-16 Nuke Sally Frank desk photographs (a) desk; (b) graffiti
- C-17 Office of the Dean of the College, On Communication from the Graduate Council, 1/9/13 (2 pages)
- C-18 Club Elections Pamphlet, 12/1/13
- C-19 Trustee Minutes, 4/13/16 (2 pages)
- C-20 Minutes of Meeting of Joint Committee of Trustees, Faculty and Upper Class Club Members on Undergraduate Life, 2/8/19 with appendix (illegible) pages)

- C-21 Minutes of Meeting of Joint Committee of Undergraduate Life, 10/11/19 (2 pages)
- C-22 Club Elections Agreement as Approved By the Joint Committee on Undergraduate Life, 10/19/19 (5 pages)
- C-23 The Upper Class Situation, A Report to President Hibben, June 1921 (14 pages)
- C-24 Princeton University Inter-Club Election Regulations, 1923 (4 pages)
- C-25 Princeton and The Club System, Report of President Hibben's Committee on Club Election Revision, 1/14/26 (12 pages)
- C-26 Trustee Minutes, 1/14/26
- C-27 Trustee Minutes, 1/13/27
- C-28 Faculty Minutes, 3/6/39
- C-29 Report by President Dodds, Regulations Governing Election to Upper Class Clubs at Princeton, 10/18/60 (6 pages)
- C-30 Report of the Special Committee on Upper Class Clubs to the Board of Trustees, 1/9/41 (9 pages)
- C-31 Trustee Minutes, 1/9/41
- C-32 Trustee Minutes, 10/23/41 (4 pages)
- C-33 Trustee Minutes, 4/16/42
- C-34 Princeton's New Club Elections System: An Appraisal of Its Accomplishments, December 1942 (8 pages)
- C-35 Trustee Minutes, 4/15/43
- C-36 Minutes, Undergraduate Inter-Club Committee, 12/5/49 (2 pages)
- C-37 Trustee Minutes, 4/20/50
- C-38 Trustee Minutes, 4/15/55 (2 pages)
- C-39 Now That You Are Eligible, 1956
- C-40 Trustee Minutes, 4/20/56 (2 pages)

- C-41 Faculty Minutes, 4/1/57
- C-42 Minutes of the Executive Committee of the Board of Trustees, 12/20/57
- C-43 Bicker 1962, Club Management
- C-44 Trustee Minutes, 1/14/67 (4 pages)
- C-45 Faculty Minutes, 12/1/69 (2 pages)
- C-46 Minutes of Executive Committee of the Board of Trustees, 5/7/71
- C-47 Ivy Club Constitution as Revised May 1978 (5 pages)
- C-48 Constitution of the Tiger Inn as Amended to June 1965 (7 pages)
- C-49 Deposition of Glenn Reinhart (55 pages)
- C-50 Constitution of University Cottage Club (9 pages)
- C-51 Resume of Sally Frank
- C-52 Transcript of Sally Frank deposition, p. 54
- C-53 Report of Special Committee—6/4/56 (5 pages)
- C-54 Objections of Ivy Club, etc.—10/24/40 (5 pages)
- C-55 An Undergraduate History of Tiger Inn pp. 9, 104-105, and 114 (5 pages)
- C-56 Excerpts from *The Ivy Club*, 1879-1979

On behalf of respondent Sally Frank:

- RT-1 Sally Frank resume
- RT-2 Sally Frank Deposition, 11/18/85  
8-9, 13-14, 29, 55-59, 102-103, 104-105, 111-113  
(including corrections by Ms. Frank to be submitted by Ms. Frank)

On behalf of respondent Princeton University:

- RPU-1 Report of Committee on Undergraduate Residential Life (CURL) dated 5/28/79 (20 pages)
- RPU-2 Excerpt from Minutes of Board of Trustees of 6/9/75 (9 pages)

- RPU-3 Final Report of University Sub-Committee on Eating Clubs dated 4/2/76 (12 pages plus 1 page attachment)
- RPU-4 Article published 2/21/67 Princeton Alumni Weekly entitled "Official Statement. . . ." (4 pages)
- RPU-5 Excerpt from Minutes of Trustee Minutes 4/13/16 (4 pages)
- RPU-6 Princeton University Inter-Club Regulations 1921-22 (5 pages)
- RPU-7 Report on Upper Class Club 6/16/22 (10 pages)
- RPU-8 Excerpt from booklet "Now That You Are Eligible" 1952
- RPU-9 Excerpt from Trustee Minutes 5/18/56 (5 pages)
- RPU-10 Report of Special Committee (etc) 6/4/56 (5 pages)
- RPU-11A Excerpt from Trustee Minutes dated 6/11/56
- RPU-11B Excerpt from Trustee Minutes dated 10/26/56
- RPU-11C Minutes Board of Governors Ivy Club dated 5/23/57
- RPU-12 Minutes Board of Governor Ivy Club dated 4/15/72 (1 page)
- RPU-13 Excerpt from Book Entitled 1st 100 Years of Ivy Club

On behalf of respondent Tiger Inn:

- RI-1 Excerpts from Transcript of Sally Frank Deposition

On behalf of respondent Ivy Club:

- RI-1 Letter dated 6/7/79 from Morales to Frank
- RI-2 Letter dated 4/25/80 from Tejada to Bowes
- RI-3 Transcript of Deposition 11/18/85, pages 7, 15, 60-1, 86, 100-101, 133

WITNESSES

On behalf of complainant:

Sally Frank  
Katherine Greider  
Eric S. Koenig  
John F. Wilson

On behalf of respondent Ivy Club:

Andy VanMeter  
Corbin R. Miller

On behalf of respondent Tiger Inn:

Stuart Rickerson  
Michelle Loftus

On behalf of respondent Princeton University:

Thomas H. Wright  
Michelle Robinson

**Order of the New Jersey Division on Civil Rights  
Dated July 28, 1986**

**STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION ON CIVIL RIGHTS**

**OAL Dkt. No: CRT 5042-85  
DCR Dkt. No: PL05-1678, 79 & 80**

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**IN THE MATTER OF:**

**SALLY FRANK,**

*Complainant,*

**—vs.—**

**IVY CLUB, TIGER INN, UNIVERSITY COTTAGE CLUB  
AND TRUSTEES OF PRINCETON UNIVERSITY,**

*Respondent.*

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**ORDER OF PARTIAL SUMMARY  
DECISION ON LIABILITY**

**SUPPLEMENTAL PROCEDURAL HISTORY**

A complete procedural history was set forth in Judge Miller's Initial Decision Partial Summary Decision, dated December 12, 1985 and in the Director's Order of Partial Summary Decision on Jurisdiction, dated February 6, 1986.\* Subsequent to that Order, Respondents filed a motion with the New Jersey Superior Court, Appellate Division for an extension of time to appeal the Director's Order. A ten day extension was granted by the Appellate Division on March 12, 1986. Thereafter, on March 18, 1986, Judge Miller issued

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\* Prior to the Director's Order of February 6, 1986 the Complainant had moved for summary decision on liability.



an Order of Inactivity to allow time for Appellate review.\* The Respondents, however, chose not to file within the ten day extension and the appeal was dismissed by the Appellate Division on March 31, 1986. After the appeal was dismissed and the Order of Inactivity lifted, proceedings on the motion for summary decision resumed. On June 16, 1986, Judge Miller issued his Initial Decision of Partial Summary Decision on Liability. Following this, there was a request for an extension of time in which to file exceptions and replies. Thereafter, an extension of time was granted to all parties until July 21, 1986, within which to file exceptions. The only exceptions filed were on behalf of Respondent Ivy Club.

### ANALYSIS

I concur in the recommendation found on page 13 of Judge Miller's Initial Decision, wherein he concluded that the ". . . Complainant's motion for summary decision as to liability should be *granted* with respect to the Respondent clubs . . ."

*N.J.A.C.* 1:1-13.2(a) provides that a summary decision "shall be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue[ ] as to any material fact challenged and that the moving party is entitled to prevail as a matter of law."

It is undisputed that the Clubs have a general policy which excludes females from consideration as members. It is also

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\* Respondent Clubs filed a separate action in Federal Court against the Attorney General and the Director on February 13, 1986. The action was stayed and administratively closed, so as to allow the State the opportunity to definitively interpret the State statute. This action was dismissed on June 9, 1986.

\*\* Although the Initial Decision addressed the issue of whether or not summary decision should be granted regarding the Trustees of Princeton University as well as the Clubs, Judge Miller signed an Order on July 22, 1986 which makes the issue of Princeton's liability moot. This Order, therefore, does not address that portion of the Initial Decision dealing with the liability of Princeton.

undisputed that this policy was applied to Complainant when she attempted to bicker at Respondent Clubs.

In light of this the Director agrees with Judge Miller that:

In view of the prior decision that the clubs are places of public accommodation which are subject to the jurisdiction of the Division, and in view of the factual findings above, viz., that the clubs intentionally exclude women in general from membership and refused to consider Sally Frank in particular, I must CONCLUDE that Respondent clubs have refused, withheld, and denied to complainant, on account of her sex, their accommodations, advantages, facilities, and privileges and have therefore violated the New Jersey Law Against Discrimination, *N.J.S.A. 10:5-12(f)*. (ID at P.10).

Finally, I note that exceptions were filed on behalf of Ivy Club and considered by the Director. I find that these exceptions did not provide any basis for rejecting or modifying Judge Miller's Initial Decision dated June 16, 1986, wherein among other things, he granted the Complainant's motion for summary decision on the question of liability with respect to clubs. Respondent's exceptions are rejected.

Therefore, it is on this 28th day of July, 1986, hereby ORDERED that the Initial Decision be adopted except as otherwise noted herein. Moreover, this matter is remanded to the Office of Administrative Law for further proceedings on the liability of damages with respect to the clubs.

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PAMELA S. POFF, DIRECTOR  
DIVISION ON CIVIL RIGHTS

By: /s/ JESUS A. RODRIGUEZ

Jesus A. Rodriguez  
Deputy Director

DATED: July 28, 1986

**Decision of the New Jersey Office of Administrative Law  
(Miller, J.)**

**Dated June 16, 1986**

**STATE OF NEW JERSEY  
OFFICE OF ADMINISTRATIVE LAW**

Oal Docket No. CRT 5042-85

Agency Docket No. PL-05-1678-1679, 1680

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SALLY FRANK,

*Complainant,*

—v.—

TRUSTEES OF PRINCETON UNIVERSITY,  
IVY CLUB, AND TIGER INN,

*Respondents.*

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**INITIAL DECISION  
PARTIAL SUMMARY DECISION**

[Appearances Omitted]

Record Closed: June 3, 1986

Decided: June 16, 1986

BEFORE ROBERT S. MILLER, ALJ:

**STATEMENT OF THE CASE AND  
PROCEDURAL HISTORY**

Sally Frank ("complainant") alleges that Ivy Club, Tiger Inn, and the Trustees of Princeton University ("respondents") discriminated against her on account of her sex, in violation of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12(e) and (f).

In July 1985, the instant matter was filed with the Office of Administrative Law for determination as a contested case,

pursuant to the provisions of *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.*

Subsequent to a prehearing conference, complainant moved for partial summary decision on the question of whether the Division on Civil Rights ("the Division") has jurisdiction over respondents. On December 12, 1985, I issued an Initial Decision finding that the Division does have jurisdiction and that its earlier ruling to that effect was a final agency decision. On February 6, 1986, the Director of the Division issued an order affirming my Initial Decision and holding that respondent clubs\* are places of "public accommodation," within the meaning of the Law Against Discrimination.

Thereafter, the case was placed on the inactive list while respondents pursued an interlocutory appeal to the Appellate Division of the Superior Court. On dismissal of the appeal, the instant matter was restored to the active list and hearing dates scheduled for July and August of 1986.

Complainant now moves for partial summary decision on the issue of liability, *i.e.*, seeking a determination that respondents have violated the Law Against Discrimination and are liable to her thereunder. The essential facts in this matter are not in dispute. They are as follows.

#### FINDINGS OF FACT\*\*

Princeton University ("Princeton") is a private, nonsectarian institution of higher education, founded in 1746. Until

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\* Princeton University, did not, and does not now, deny that it is a "place of public accommodation" or that the Division has jurisdiction over it.

\*\* These Findings of Fact are taken from the statement of facts set forth in the memorandum of law of Princeton University; from the memorandum of law of Ivy Club, in opposition to the instant motion; from the "Undisputed Facts" stated by the Director in her Finding of Probable Cause dated May 14, 1985; from the affidavits of Joan S. Girgus (Dean of the Col-

1968, Princeton admitted only male students as und[e]rgraduates. Women were admitted as undergraduates for the first time in 1969.

*A. The Clubs And The Bicker Process*

At present, there are thirteen independent eating clubs in Princeton, New Jersey, which offer social, recreational and dining activities to their undergraduate members. During the 1983-1984 academic year, 1570 out of 2230 of Princeton's juniors and seniors had some variety of meal contract at one of these clubs. Those juniors and seniors who do not join clubs obtain dining contracts for a university-operated facility, purchase individual meals at those facilities, eat at other establishments in or near Princeton, or prepare their own meals in dormitory kitchens.

Although they were originally selective and all-male, eight of the clubs are now non-selective and coed. They are Campus, Charter, Cloister Inn, Colonial, Dial Lodge, Elm, Quadrangle and Terrace. Admission to these nonselective clubs is by a lottery system, although Quadrangle Club requires each student seeking admission to collect the signatures of fifteen of its members.

Five of the clubs are "selective." They are Ivy, Cottage, Tiger Inn, Cap and Gown, and Tower. Membership in these clubs is by invitation only. Offers to join these clubs are extended after the club members vote on the applicants. Of these five, two, respondents Ivy and Tiger Inn, are still all male. Cottage Club has decided to accept women members and been dismissed from the case. Tower and Cap and Gown have, for several years, accepted women.

"Bicker" is the term for the process used by the five selective clubs for interviewing and selecting new members. Since

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lege of Princeton University) and Thomas H. Wright, Jr. (General Counsel and Secretary of the Trustees of Princeton University), which were submitted by Princeton University in opposition to the instant motion; and from the deposition of Sally Frank (transcript, pp. 60-1).



at least 1977, there have been a Fall and a Spring Bicker. The rules for bicker change from time to time.

A student at Princeton who is interested in one of the selective clubs must first register. Once registered, the student is required to attend three bicker sessions at each of the clubs to which application is being made. The bicker sessions are intended to give students a glimpse of life at the club and the club members an opportunity to evaluate the bickerees. The club members are required to submit written comments about bickerees with whom they have spoken. The club members then meet for a "bid session" to decide which bickerees will receive invitations to join the club.

Since 1979, Tiger Inn's Bicker Chairman has had the responsibility to meet with the bicker representatives from the four other selective clubs to choose a Sophomore to head the Committee on Bicker Administration ("CBA"). The CBA typically has both male and female members. Since at least 1978, the bicker process has been totally funded by the individual selective clubs.

From at least 1977 until the end of 1979, a small space in the area of the Dean of Student Affairs' Office was made available to the students administering the process for Spring Bicker registration. Registration consisted of applicants to all of the selective clubs picking up a form, filling it out, and dropping it in a cardboard box. Beginning in 1980, registration for Spring Bicker took place at Tower Club. The Dean of Student Affairs did not have any control over the contents of the form or the bicker process in general.

Prior to 1980, CBA was permitted to use space in Princeton's Dillon Gymnasium for bicker administration. In 1980, the CBA requested and received permission to use different space, located in the basement of the Commons, one of the University's dining facilities. The use of the Commons space lasted until 1984.\* No rent was charged for the use of either space until 1982, at which time rent was charged. The 1984 Spring Bicker was administered from the CBA chairman's dormitory room.

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\* At the request of the students running the bicker process, Princeton changed locks on the spaces provided, without charge, through 1981.



Princeton made telephone service available to the members of the CBA, but charged them for it. The charges were paid by the Sophomore Class through 1977 and by the CBA beginning in 1978. The students on the CBA had access to time on Princeton's central computer, without charge, prior to the 1978-1979 academic year. During that year, a total of \$159.77 worth of computer time for the bicker process was used. Following that academic year, the CBA obtained computer time from another source.

### *B. Sally Frank And The Bicker Process*

Complainant Sally Frank was a student at Princeton from September 1976 through June 1980, when she graduated. Complainant attempted to bicker at the respondent clubs on several occasions.

During her sophomore year (1977-1978), Ms. Frank registered for Spring Bicker. She went to the Dean of Student Affairs' Office, found the bicker registration forms left there by the CBA, took one, completed it and put the completed form in the box provided for that purpose by the CBA. In completing the form, Ms. Frank used only her initials and responded "male" to the question concerning her gender. She subsequently received a printout with appointments at each of the selective clubs, including the respondents. Ms. Frank chose not to bicker at the coed selective clubs.

The following academic year (1978-1979), Ms. Frank again registered for Spring Bicker. She obtained the form at the Dean of Student Affairs' Office, again used her initials, left the gender question blank and deposited the form in the CBA's box. Ms. Frank received a telephone call from the chairwoman of the CBA, who informed her that she would not receive appointments at the respondent clubs. She then received a printout with appointments only at Cap and Gown and Tower, at which Ms. Frank chose not to bicker.

During the beginning of her senior year (1979-1980), Ms. Frank attempted, for the first time, to participate in Fall Bicker. In response to a notice in the Princeton newspaper,

*The Daily Princetonian*, Ms. Frank telephoned the respondent clubs to request permission to bicker. She did not go to the Dean's office or fill out the form used by the CBA for Spring Bicker, which process was not applicable. She did not attempt to bicker at Tower.

Ms. Frank participated in Spring Bicker during her senior year. In December of 1979, she obtained the CBA's registration form, again used her initials and did not respond to the gender question, and deposited the completed form in the CBA's box at the Dean's Office. Ms. Frank contacted the president of each of the respondent clubs about whether she could bicker. She was permitted to bicker on only one occasion (at Ivy in the Spring of 1979) during the three years she attempted to do so. She was totally denied the opportunity to bicker at respondent clubs in the Spring of 1980. On the one occasion she was allowed to bicker, restrictions were placed on her that were not placed on men, and she was told not to have any false expectations of getting a bid. She never received a bid for membership from respondent clubs.

### *C. The Clubs And Publications*

The Sophomore Class of Princeton publishes an annual booklet describing various aspects of undergraduate life, both academic and social. The booklet has been known by various names, including "Choices" and "Princeton's Guide to Academics and Social Life." Through 1977, the booklet was partially funded by the Office of the Dean of Student Affairs. Since 1978, it has been funded by sophomore class dues. Prepared by students, it is not now an official Princeton publication, nor does Princeton exercise[ ] editorial control over its contents.

Some official Princeton publications refer to the existence of the clubs, both open and selective, and the fact that, at the time, three of the selective clubs were all-male. This reference is included in a listing of the various dining and social arrangements chosen by juniors and seniors. For example,

the booklet entitled "Admissions Information, 1985-1986," states, with respect to the clubs:

More than half of all juniors and seniors take their meals at one of the nonresidential, private eating clubs along Prospect Avenue. The clubs provide an intimate, comfortable atmosphere, with lounge and recreation areas and libraries. The clubs offer social, athletic, and educational programs, as well as meal and party exchanges.

Eight of the clubs are nonselective and coed; a student simply signs up to join. Two are selective and coed, and three are selective and all male.

#### *D. The Clubs And Meal Exchange Programs With Princeton*

Princeton and the clubs, both open and selective, participate in three different meal exchange programs. They are all intended to enable students at Princeton to interact with one another by increasing the students' flexibility in using the university's board contracts. The program intended to permit sophomore students to eat at clubs which they might join is known as the "Upper Class Choice" program. The meal exchange arrangements are administered by the Upper Class Choice Committee, a committee of sophomore students. At the end of the program, the university's Department of Food Services transfers to each participating club an amount equal to the university's, not the club's, cost per meal times the number of meals eaten at the club by students with university meal contracts. Princeton does not set any restriction on the ability of any sophomore student with a board contract to participate in the program. The other programs also involve reimbursement to the clubs for meals eaten at the clubs by students having Princeton meal contracts.

The *Blair* case thus indicates that to decide whether aiding and abetting has occurred, one must first determine whether a respondent has "initiated or acquiesced in" the discriminatory practice, or has been "promotive of" it.

In her reply brief, Complainant suggests another test for identifying improper involvement with discrimination, *i.e.*, aid that has "*a significant tendency to facilitate, reinforce, and support [impermissible] discrimination.*"\* *Norwood v. Harrison*, 413 U.S. 455, 466, 93 S.Ct. 2804, 37 L.Ed. 2d 723 (1973) (state loan of textbooks to all students, including those attending racially segregated schools, violates the equal protection clause of the Fourteenth Amendment).

Complainant argues that whether I apply the *Blair* test or the *Norwood* test, it is clear that Princeton has violated section (e). She points to the following facts: Princeton provided space in university buildings for bicker administration; it provided the bicker committee telephones, locks and computers; it was at various times involved in the publication of literature specifying the discriminatory admissions policy of the two respondent clubs; it was intimately invol[v]ed in a meal exchange program with the respondent clubs; and it provided numerous other services, including a co-op food buying arrangement, snow removal, phone service, intramural athletic programs and access to alumni mailing lists.

In response, Princeton has argued that the space and services provided were in aid of the bicker committee and not of the all male clubs; the publications were not intended to facilitate the allegedly discriminatory practices of the clubs; the food co-op was used only twice by the respondent clubs; snow removal is not requested by the clubs; the providing of phone service does not give the "appearance" that membership policies are approved or accepted by the university; any group of students may form an intramural athletic team; and the alumni mailing list is available to all university alumni.

At the heart of Princeton's argument is the premise that none of the acts individually, or all of them together, evi-

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\* I find this test to be relatively clear and meaningful and hereby adopt it for purposes of interpreting *N.J.S.A. 10:5-12(e)*.

dence the requisite intent to aid and abet discrimination.\* Indeed, through the affidavits of the Dean of the College and of the General Counsel and Secretary of its trustees, Princeton specifically denies any such intent.

It is, of course, quite possible to reject Princeton's argument by pointing out that actions speak louder than words, that no one can escape liability for aiding and abetting illegal discrimination merely by disclaiming or even denouncing it, and that the totality of the circumstances manifests Princeton's desire and intention to help the clubs in their discriminatory practices.

If, as presently required, however, I resolve all doubts and draw all inferences in favor of Princeton, I must conclude that the aid and assistance given to respondent clubs was (a) minimal and had no "significant tendency" to facilitate, reinforce, and support the legal discrimination (the *Norwood* test), and (b) was not "promotive of" discrimination (the *Blair* test, in part). At the conclusion of the plenary hearing—after both sides have had the opportunity to present additional evidence—Princeton will no longer have this advantage.

With respect to that part of the *Blair* test referring to "initiating" or "acquiescing in" discrimination, it is my opinion, for the reasons which follow, that it has only limited applicability and usefulness, at least in the context of the instant case. First, there is no claim that Princeton "initiated" the discriminatory behavior of the clubs. Second, since the publishers in *Blair* themselves actively engaged in discriminatory conduct by publishing sex-segregated advertisements, the "acquiescence" part of the test is dicta. Third, to make people liable for "acquiescing in" discrimination could open up a "Pandora's box" of litigation and frivolous claims and

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\* Proof of discriminatory motive or intent is a crucial element of a discrimination case. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335, n.15 (1977). It is well recognized, however, that intent is very difficult to prove and "must be found by examining what was said in the circumstances of an entire transaction." *Goodman v. London Metals Exchange, Inc.*, 86 N.J. 1930 (1981), citing *Parker v. Dornbierer*, 140 N.J. Super. 185, 189 (App. Div. 1976).



**Order of the New Jersey Division  
on Civil Rights Dated February 6, 1986**

**STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION ON CIVIL RIGHTS**

**OAL Dkt No.: 5042-85**

**DCR Dkt No.: PL05-1678,79 & 80**

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**IN THE MATTER OF:**

**SALLY FRANK,**

*Complainant.*

**—v.—**

**IVY CLUB, TIGER INN, UNIVERSITY COTTAGE CLUB AND  
TRUSTEES OF PRINCETON UNIVERSITY,**

*Respondents.*

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**ORDER OF PARTIAL SUMMARY DECISION  
ON JURISDICTION**

**PROCEDURAL HISTORY**

In December of 1979, Ms. Frank filed a Verified Complaint against Ivy Club, Tiger Inn and the University Cottage Club [hereinafter "Clubs"] as well as Princeton University alleging discrimination based on sex in a place of public accommodation in violation of *N.J.S.A. 10:5-12(f)*. The Clubs responded to the Complaint by denying that they were places of public accommodation. The three Clubs also asserted that their members' freedom of association rights would be violated if the Complainant was granted the requested relief. In answer to the Complaint, Princeton University denied that the University was a place of public accommodation. Princeton University also claimed that the University had committed no discriminatory acts.



On December 9, 1981, after an investigation of the allegations, the Division on Civil Rights (hereinafter "Division") dismissed the complaint against the Clubs finding that the Clubs were exempt from public accommodations provisions of the New Jersey Law Against Discrimination (hereinafter "L.A.D.") because the Clubs were "in their nature distinctly private," pursuant to *N.J.S.A. 10:5-5(1)*. The Division also found no probable cause to credit the allegations of discrimination filed against Princeton University.

Ms. Frank appealed the decision of the Division. On August 1, 1983, the Appellate Division, while taking no position on the merits of the complaint, vacated the decision by the Division and remanded the case for further investigation. The Division on Civil Rights filed a Petition for Reconsideration. In the Division's brief in support of the Petition for Reconsideration, the Division set forth its intentions on how to proceed unless the Court provided further guidance.

[T]he Division would propose initially to hold a fact-finding conference in order to determine which, if any, of the mass of facts collected by the Division are actually in dispute, and whether there are further facts which the parties wish to bring to the Division's attention. Thereafter, if there were disputed issues of material fact, it would be appropriate to hold a plenary contested case hearing to determine jurisdiction. If there are no material facts in dispute, the Division would issue a determination of jurisdiction containing appropriate findings of fact and conclusion of law, with further proceedings to be held if the Division has jurisdiction [Division Brief at 9n.].

The Petition for Reconsideration was denied on September 6, 1983.

With no further guidance from the Appellate Division, the Division proceeded to implement the process outlined in the brief. The parties were advised that a fact-finding conference would be held to determine if "there are material facts in dispute. In the event that there exists genuine issues of material fact, the Division will conduct a public hearing to resolve the

*E. Other Aspects Of The Relationship  
Between The Clubs And Princeton*

Respondent clubs have a long-established policy of excluding women from membership and, in fact, have never admitted women as members. At all relevant times, Princeton knew of this policy and of the exclusionary practices, but did not specifically approve or condone them.

Beginning in the early 1970's, Princeton became concerned about the continued financial viability of some of the clubs and of the club system generally. It took certain measures accordingly, including the following:

1. Commissioning a major study of the clubs, made during the period from 1973-1975, by a firm known as Haskins and Sell ("H & S").
2. On June 9, 1975 adopting a resolution which affirmed the value and importance of the club system as a whole to Princeton while at the same time disclaiming any responsibility for discriminatory practices of any individual club or clubs.
3. Putting into effect a meal exchange program between the clubs and itself, the details of which are referred to above (sub-part D).
4. Before 1978, providing assistance, via various university officials, to all the clubs with respect to such matters as coordination of information between the clubs and prospective club members.
5. Allowing all clubs to participate in intra-mural athletic programs and activities.
6. Plowing the snow off the sidewalk in front of club property.
7. Providing access to alumni mailing lists.

## ISSUES AND ANALYSIS

*N.J.S.A.* 10:5-12(f) states that it is unlawful for "any owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation directly or indirectly to refuse, withhold or deny to any person any of the accommodations, advantages, facilities or privileges thereof."

*N.J.S.A.* 10:5-12(e) makes it a violation of the Law Against Discrimination for "any person . . . to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so."

In its motion for summary decision, complainant alleges that respondent clubs have violated *N.J.S.A.* 10:5-12(f) and that Princeton, by aiding and abetting the clubs, has violated *N.J.S.A.* 10:5-12(e).

*Summary Decision*

*N.J.A.C.* 1:1-13.2(a) provides that a summary decision "shall be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law."

In considering a motion for summary judgment, the court must "accept as true all of the proffered material facts that will serve to defeat the motion for summary judgment and to find, if at all possible, a genuine dispute over material facts sufficient to preserve the matter for trial." *Rosenberg by Rosenberg v. Cahill*, 99 N.J. 318, 327 (1985). Further, all inferences of doubt must be drawn against the moving party. *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 N.J. 67, 75 (1954); *Nolan v. Otis Elevator Co.*, 197 N.J. Super. 468, 474 (App. Div. 1984); *Baer v. Sorbello*, 177 N.J. Super. 182, 185 (App. Div. 1981). Motions for summary judgment are granted with "extreme caution," since all doubts are resolved against the movant. *Baer v. Sorbello*, *supra*, at 185.

Caution is particularly appropriate where subjective elements, such as intent or motive, are involved. *Exxon Corporation v. Wagner*, 154 N.J. Super. 538, 541 (App. Div. 1977). Summary judgment is ordinarily not granted where issues of subjective intent are concerned. *Barbetta Agency, Inc. v. Evening News Pub. Co.*, 135 N.J. Super. 214, 223 (App. Div. 1975).

In the event, however, that there is no factual dispute, the court will rule on the claim as a matter of law, *Felbrout v. Able*, 90 N.J. Super. 587 (App. Div. 1963). A material fact is one that will make a difference in the result of the case, and a question of fact which is immaterial to the resolution of the dispute will not defeat a summary judgment motion. *E.E.O.C. v. Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir. 1983), *cert. den.* 105 S.Ct. 92 (1984).

The summary judgment procedure is used to dispose promptly of actions in which there is no genuine issue as to any material fact, *Tyson v. Groze*, 172 N.J. Super. 314 (App. Div. 1980), the purpose being to eliminate an unnecessary trial with its attendant delay and expense. *Pfitzinger v. Board of Trustees, PERS*, 62 N.J. Super. 589 (L. Div. 1960).

### *The Clubs\**

The clubs assert that genuine issues of material fact exist in the instant case. They claim that no trial-type hearing has been held and that they were never given a real opportunity to present their case.

The same contention, however, was raised by the clubs in opposition to complainant's earlier motion for summary decision on jurisdiction and was rejected both by me and by the Director.

The respondent clubs have presented no compelling reasons for me to now reconsider and reverse my earlier ruling, and, accordingly, I decline to do so.

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\* Tiger Inn submitted no papers in opposition to the instant motion and was not heard on oral argument. I shall assume, however, that Tiger Inn's position is basically the same as that of the Ivy Club.

In view of the prior decision that the clubs are places of public accommodation which are subject to the jurisdiction of the Division, and in view of the factual findings above, viz., that the clubs intentionally exclude women in general from membership and refused to consider Sally Frank in particular, I must CONCLUDE that Respondent clubs have refused, withheld, and denied to complainant, on account of her sex, their accommodations, advantages, facilities, and privileges and have therefore violated the New Jersey Law Against Discrimination, *N.J.S.A. 10:5-12(f)*.

*Princeton University*

Princeton has adopted the clubs' argument about the continued existence of issues of material fact. Having already rejected the clubs' argument in this respect, I must now also reject Princeton's.

Princeton, however, is not charged with directly discriminating against complainant, but rather with "aiding and abetting" such discrimination by the clubs. The question thus becomes whether, at this posture of the case, I must find that as a matter of law Princeton has violated *N.J.S.A. 10:5-12(e)* ("section (e)") by aiding and abetting the unlawful discrimination. For the reasons which follow, I CONCLUDE that this question must be answered in the negative.

I am aware of only one New Jersey case discussing section (e) at any length, viz., *The Passaic Daily News v. Blair*, 63 *N.J.* 474 (1973). In that case a newspaper argued that it was not a violation of section (e) to print sex-segregated column headings in its employment advertisements. The court held against the newspaper, declaring that "a publisher of a paper who either *initiates or acquiesces in* advertising publication practices which discriminate or encourage or facilitate discrimination" is aiding in such discrimination, 63 *N.J.* at 488. (emphasis mine) The court further stated that the printing of such sex-segregated advertising was "promotive of" illegal sexual discrimination and was therefore properly forbidden by agency regulation.



implicates profound moral, ethical and philosophical issues, which should be carefully studied and considered before the test is adopted. Fourth, the phrase "promotive of discrimination" is, in my opinion, vague and imprecise and adds little to the existing statutory language of "aid and abet." Finally, the Division itself has never ruled on whether mere "acquiescence" is enough to make one liable as an aider and abetter, and I believe that counsel should have further opportunity to research and argue the point.

#### CONCLUSION AND ORDER

Accordingly, I CONCLUDE that complainant's motion for summary decision as to liability should be *granted* with respect to the respondent clubs and *denied* with respect to the Trustees of Princeton University. It is so ORDERED.

This recommended decision may be affirmed, modified or rejected by the DIRECTOR OF THE DIVISION ON CIVIL RIGHTS, PAMELA S. POFF, who by law is empowered to make a final decision in this matter. However, if Pamela S. Poff does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

I hereby FILE my Initial Decision with PAMELA S. POFF for consideration.

June 16, 1986

DATE

/s/ ROBERT E. MILLER

ROBERT E. MILLER, ALJ

Receipt Acknowledged:

June 18, 1986

DATE

/s/ ROBERT STOKES

DIVISION ON CIVIL RIGHTS



Mailed To Parties:

June 18, 1986

/s/ RONALD I. PARKER /ks

DATE

OFFICE OF ADMINISTRATIVE LAW

ks

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EXHIBITS

None

WITNESSES

None

disputed issues." [Letter from Pamela S. Poff, Director to Counsel, dated October 5, 1983.] If no material facts were in dispute, the "Director will then issue a decision as to jurisdiction." *Id.* The Division proceeded to conduct an extensive investigation. Two fact-finding conferences were held at which all parties were represented by counsel\* and were offered the opportunity to make opening and closing statements. The parties were permitted to call as many witnesses as they wished. Though not sworn, the witnesses were subject to cross-examination and parties were able to supplement and/or correct their testimony by affidavits. Where authenticity was agreed upon, all parties were permitted to introduce documentary evidence supporting their contentions. During the fact-finding process, Complainant proposed approximately 39 stipulations and approximately 194 stipulations were proposed by the Clubs. These stipulations were extensively discussed by all parties in an effort to expedite the investigative process. The parties reached agreement on 28 stipulations proposed by complainant and 177 proposed by respondents. Finally, all parties made extensive legal argumentation through briefs, reply briefs and letter memoranda.

On May 14, 1985, on the basis of the investigation and fact-finding process, the Director issued a Finding of Probable Cause. The document was comprised of two sections—Jurisdiction and Discrimination. In the section entitled jurisdiction, the Director found that the Clubs and Princeton

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\* The first fact-finding conference was held on March 12, 1984 and was attended by James Sincaglia Chief, Bureau of Enforcement, Division on Civil Rights; Nadine Taub, Esq., for Sally Frank; Corrine L. McGovern, Esq., Deputy Attorney General for the Division on Civil Rights; Barbara Strapp-Nelson, Esq., for Ivy Club and University Cottage Club; Laura Ford, Esq., and Thomas Wright for Princeton University; R. H. Beatie Jr., Esq. and Babette D'Amelio Esq., for Tiger Inn; and Sally Frank. The second fact-finding conference, held April 3, 1984, was attended by James Sincaglia, Chief, Bureau of Enforcement, Division on Civil Rights; Corinne L. McGovern, Deputy Attorney General for Division on Civil Rights; Babette D'Amelio Esq., for Tiger Inn, Laura C. Ford Esq. for Princeton University; Barbara Strapp Nelson, Esq., for Ivy Club & Cottage Club; Nadine H. Taub, Esq., for Sally Frank, and Sally Frank.

University were subject to the jurisdiction of the Division on Civil Rights. This conclusion was based on "undisputed material facts" and "conclusions drawn from those facts." [Finding of Probable Cause at 39].

Pursuant to *N.J.S.A.* 10:5-13, complainant requested that the Director transmit the matter to the Office of Administrative Law and in July 1985, the case was filed as a contested case at O.A.L.\* A pre-hearing conference was held on September 26, 1985 by Administrative Law Judge Robert S. Miller. Subsequent to that conference, complainant moved for Partial Summary Decision on the issue of jurisdiction. The motion was opposed by the Clubs.\*\* On December 12, 1985, ALJ Miller filed an Initial Decision granting Partial Summary Decision on the jurisdictional issue.

Exceptions were received from the Clubs and a reply to those exceptions, received from the Complainant. On January 8, 1986 the Director informed the parties that in deciding this issue she viewed the record to consist of all materials submitted to ALJ Miller as well as all the documents listed in the Statements of Items submitted to ALJ Miller\*\*\* and the

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\* *N.J.S.A.* 10:5-13 provides complainant with a right to transmit the case to the O.A.L. at any time after 180 days from the filing of the complaint as long as the Director had not found no probable cause to credit the allegations or had otherwise dismissed the complaint. Even if the complainant had not exercised this right, if conciliation failed the case would have been transmitted to O.A.L. to determine liability and damages. See *N.J.S.A.* 10:5-16.

\*\* Princeton University filed a letter in lieu of a formal brief. In that letter, Princeton withdrew the defense of lack of jurisdiction thus rendering the motion moot as to Princeton.

\*\*\* By letter of September 30, 1985, Counsel for Ivy Club and University Cottage Club sent to Judge Miller (with copies to all parties) two Statements of Items comprising the record. The first, "Statement of Items Comprising the Record of *Sally Frank v. Princeton University, University Cottage Club, Ivy Club and Tiger Inn*, Docket No. PL-05-1678, PI-05-1679 and PL-05-1680," was a list supplied to all counsel of the documents and materials submitted during the remand proceedings. The second, "Statement of Items Comprising the Record on Appeal" was a list provided to the Appellate Division of those items in the record prior to Ms. Frank's appeal. These lists were supplied to Judge Miller in response to questions raised about what constituted the record before the Division.

transcript of the two fact-finding conferences. [Letter from Pamela S. Poff to Counsel]. Supplemental exceptions were filed by Ivy Club and University Cottage Club.

#### ANALYSIS

Complainant has moved for partial summary decision in this matter on the issue of jurisdiction. The Clubs oppose the motion and assert entitlement to a full hearing at the Office of Administrative Law on the issue. Having given careful consideration to the complete record, I concur with the recommendation of Administrative Law Judge Miller that the motion for partial summary decision should be granted. [ID at 8].

The Division, "in the unusual and important circumstances of this case," *Frank v. Princeton University, et al* (Docket No. A-2378-81T3, 1983) Slip Opinion at 6, devised and implemented a fair procedure to resolve the jurisdictional dispute. This procedure allowed for a plenary hearing only if after the fact finding hearing genuine issues of material facts remained in dispute. At the completion of the investigative process, the record contained undisputed evidence of links with Princeton University sufficient to negate the Clubs defense that they were "in their nature distinctly private." The Division, therefore, determined that the Clubs were places of public accommodation within the Law Against Discrimination.

The case was then transmitted to the Office of Administrative Law. The parties submitted various materials to A.L.J. Miller including the stipulations, the Appellate Division Decision, and the two Statements of Items Comprising the Record. Furthermore, attached to briefs filed with A.L.J. Miller, were affidavits by counsel for the complainant and counsel for Ivy and Cottage describing the proceedings before the Division. The Clubs were also given an opportunity by ALJ Miller to show "[w]hat material facts are in dispute, if any," [Letter from ALJ Miller to Counsel dated October 31, 1985], however, no affidavits were submitted to support any allega-

tions of factual disputes. After a careful review of the materials submitted to ALJ Miller and the exceptions filed by the Clubs, I find that no *genuine* issue of *material* fact remains in dispute. Because of this, as Judge Miller noted, holding a full hearing on jurisdiction at OAL would be "duplicative, repetitious, time consuming and wasteful." [ID at 7]. Therefore, based on the undisputed facts, conclusions and legal reasoning as set forth in the jurisdictional section of the Finding of Probable Cause and incorporating that section into this decision, I hereby grant complainant's motion for partial summary decision on jurisdiction.

The Clubs contend that genuine issues of material fact are in dispute. Essentially they point to three types of disputed issues.\* First are issues which are clearly questions of statutory interpretation such as whether the Clubs are "bona fide" or "distinctly private." [Supplemental Exceptions #4 at 3-4]. These issues are legal issues and "may be resolved without the necessity of a testimonial trial." *Clark v. Degnan*, 163 N.J. Super. 344, 368 (Law Div. 1978), *aff'd as modified*, 83 N.J. 393 (1980).

Next are issues where certain factual disputes remain.

Unresolved is the issue of whether an Interclub Agreement ever existed between Princeton University and the Clubs. Other disputed facts include the nature of the "hat bid procedure" at one time used in Club membership selection, the extent to which implications of the hat bid procedure applies equally to all three Clubs, and the extent to which Club facilities are available for use by the general public [Tiger Inn Exceptions at 5].

The Jurisdictional Section of the Finding of Probable Cause addressed all of these issues. The existence *vel non* of an

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\* Additionally, the Clubs claim that the Director's reliance on the Progress Report of the Subcommittee on Clubs and a Final Report by the Princeton University Trustee Committee on Eating Clubs was improper since they were not given an opportunity to test the truthfulness of its content. There is no question that the documents are admissible as party admissions. See *N.J. Rules Evid.* 67(7). The Clubs' conclusory allegations regarding the veracity of these documents' contents are not sufficient to preclude summary disposition. See *Burman v. TransWorld Airlines, Inc.*, 570 F. Supp. 1303, 1313 (N.D.Ill. 1983).



InterClub Agreement was found immaterial in light of the undisputed facts that the agreement was published in a University booklet and that unsigned copies were available at the Dean's office. Even assuming no agreement was ever executed, the University held the agreement out to the students as existing. This, not the actual execution, was the importance of the agreement.

The facts relied on regarding the hat bid and the availability of public access to the Clubs were either agreed upon by stipulations, or were derived from the testimony of the Clubs' own witnesses and affidavits submitted by the Clubs. The aspects of these facts which are now disputed is not clearly identified by the Clubs in their briefs to A.L.J. Miller nor in their exceptions. However, assuming certain aspects are disputed, the Clubs have not demonstrated how these disputes are material. The mere existence of facts in dispute does not preclude summary judgment. A showing must be made that the disputed facts are material to the outcome of the case. See *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir. 1983), cert. den., 105 S.Ct. 92 (1984; *Billoti v. Accurate Farming Corp.* 39 N.J. 184 (1963). The Clubs in their briefs and exceptions have not specifically identified the disputes nor have they shown how the disputes are material. Summary decision based on undisputed facts, therefore, is appropriate.

Finally, the Clubs suggest that genuine issues of material fact are raised by their disagreement with the conclusions that were drawn from the undisputed facts.\* [Supplemental

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\* Some of these issues are really not disputed at all. For example, Supplemental Exception 5C states that no *authority* over the Clubs was delegated to the CBA or the InterClub counsel. The Director's conclusion referred to, however, merely states that these organizations are vehicles for the Clubs to work with one another and with the University. Whether or not any authority was delegated is immaterial to this conclusion. Other issues raised really go the significance of undisputed facts. In Supplemental Exception 5D, the Clubs dispute the conclusion that Princeton University and the clubs are integrally connected and also dispute that "the relationship the Division finds between the Respondent Clubs and Princeton University is of any significance relating to jurisdiction." The Director found, however, that as a legal matter, the relationship is significant and that the only reasonable con-



Exceptions #5 at 4-5]. The Clubs have not, however, pointed to any evidence which they could introduce at a hearing that actually raises a dispute. When a dispute "merely relates to a conclusion to be drawn from the facts, and is not of itself a factual dispute," summary judgment is not precluded. *Kryscnski v. Shenkin*, 53 N.J. Super. 590, 597 (App. Div. 1959). See also *State v. Interpace Corp.*, 130 N.J. Super. 322, 327 (App. Div. 1974). In this matter, the Director drew the only reasonable conclusions from the underlying undisputed facts and correctly determined that no *genuine* issues of *material* dispute were raised by the Clubs.

By their own admission, the Clubs had ample opportunity to put before the Director all the information they wanted her to consider. [See Supplemental Exceptions #6 at 5]. Thereafter, they had a second opportunity to present arguments and submissions to the A.L.J. and then to present exceptions and supplemental exceptions to the Director. These documents demonstrate no further facts or evidence that could be introduced to justify or necessitate a full hearing on the matter at O.A.L. Since, "there is only one reasonably justifiable conclusion on the law and the operative facts," *Tubular Service Corp. v. Com. State Highway Dept.*, 77 N.J. Super. 556, 561 (App. Div. 1963), summary disposition is appropriate.

The Clubs also contend that regardless of the process implemented by the Division on Civil Rights, they are entitled to a full hearing at the Office of Administrative Law based on the Administrative Procedure Act, the guarantees of due process and fundamental fairness and the Appellate Division decision remanding the case to the Division. I find, however, no merit to these claims.

The Administrative Procedure Act alone cannot provide the "mandate" for a hearing that the Clubs assert exists. [See Ivy Club and University Cottage Club Brief at 10]. "The Act does not create a substantive right to a hearing, but merely

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clusion based on the undisputed facts was that the Clubs and Princeton were "integrally connected in a mutually beneficial relationship" [Finding of Probable Cause at 35].

details the procedure to be followed where a hearing is otherwise required by statutory law or constitutional mandate." *Little Falls Tp. v. Bardin*, 173 N.J. Super. 397, 404 (App. Div. 1979). Additionally, reliance on the description of a "contested case" in OAL regulations does not help the Clubs' argument. "These rules do not interfere with the agency head's ability to determine the character of the cases before the agency, to select the appropriate procedure for resolving cases, or to hear and decide contested cases . . . these provisions were not intended to usurp the agency head's authority to decide what constitutes a contested case or to determine the type of proceeding appropriate for resolving a particular matter." *In Re Uniform Adm'v Procedure Rules*, 90 N.J. 85, 105 (1982). In this case, the Director opted for a flexible procedure to determine jurisdiction that allowed for an O.A.L. hearing only if genuine issues of material fact existed. Since no material facts were found to be in dispute, the issue of jurisdiction was summarily decided. Neither the APA nor O.A.L. regulations require any more.

Respondents also rely on concepts of due process and fundamental fairness to prove entitlement to a hearing on jurisdiction before the O.A.L. These doctrines, however, do not require a hearing unless material facts are in dispute. See *Cunningham v. Civil Service Commission*, 68 N.J. 13 (1975). "Due process never requires a trial on nonfactual issues. What is needed on such issues is argument, written or oral, not evidence, and not trial procedures." *Bally Mfg. Corp. v. N.J. Casino Control Comm'n*, 85 N.J. 325, 334 (1981), quoting, 2 Davis, *Administrative Law Treatise*, § 12.1 at 406 (2d Ed. 1979).\*

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\* Even if Respondents were entitled to some form of evidentiary hearing based on due process or fundamental fairness, the Division's investigative proceeding would have provided all the process to which they were entitled. "Fairness not rigid formality" is "the touchstone" of due process rights. *Matter of Stowman*, 200 N.J. Super. 507, 512 (App. Div. 1985). The parties, in the investiga[t]ive proceeding had the opportunity to call witnesses, to present evidence, to be apprised of all evidence to be considered and to argue why jurisdiction should not be asserted. These constitute the important elements of a fair hearing. *Id.* The Clubs assert that the failure to have wit-

Finally, the Clubs rely on the Appellate Division's decision remanding the case to the agency to claim entitlement to a full hearing before the Office of Administrative Law. The Appellate Division, in *Frank v. Princeton University, et al, supra*, found that the complainant was "entitled to a more formal inquiry as to the factual issues insofar as they relate to jurisdiction of the Division over her complaint." Relying on *Cunningham, supra*, the court held that the agency procedure had been inadequate and as the petitioners in *Cunningham*, "the complainant is 'entitled to a hearing as a matter of fundamental fairness and administrative due process.' " *Frank*, Slip Opinion at 9 quoting *Cunningham v. Civil Service Commission*, 68 N.J. at 26. *Cunningham*, however, did not guarantee the petitioners a hearing. In *Cunningham*, the petitioners were only entitled to a hearing if they made an offer of proof supported by affidavit to show genuine issues as to any material fact.\* "If petitioners have no such proof, then the need for a plenary type hearing does not exist. [Citations omitted]. In that event, petitioners should be given the opportunity to present arguments orally or in writing . . ." *Cunningham*, 69 N.J. at 25.

As *Cunningham* instructed, the Clubs were given the opportunity to show that material facts were in dispute. Since no material facts were shown to be in dispute, the Clubs were given all that they were entitled to—"the opportunity to present argument orally or in writing. . ." *Cunningham*, 69 N.J. at 25. Nothing further was needed or required.

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nesses testify under oath and the inability to argue the relevancy of evidence somehow undermines their due process rights. Such an argument is without merit. Due process does not necessarily require sworn testimony. See *Matter of Stowman*, 200 N.J. Super. 507. Clearly the clubs can show no prejudice from reliance on facts presented through testimony which was not under oath when those facts are not disputed. As to arguments regarding relevancy, at the end of the investigative phase the Clubs all had and used the opportunity to argue relevancy of evidence [See Reply Brief of Ivy and Cottage at 8].

\* In *Cunningham*, these issues would involve disputes over the actual job duties of the two positions. Whether the positions were "comparable" was a conclusion to be drawn from those underlying facts and was not a dispute that alone created a genuine issue of material fact. 69 N.J. at 24-25.

## CONCLUSION

For the reasons stated above, I find no need for nor any entitlement to a full hearing at the Office of Administrative Law on the issue of jurisdiction. Relying on the doctrine of the law of the case, a "non-binding decisional guide addressed to the good sense of the court," A.L.J. Miller correctly determined that it was reasonable, necessary and fair to the parties to avoid the time and expense of repetitious litigation and to grant summary decision on the issues of jurisdiction. [ID at 7]. Accordingly, the Director rejects respondents' exceptions and affirms the finding and determination as rendered in the Jurisdictional section of the Finding of Probable Cause and the Initial Decision in this matter.

Therefore, it is on the 6th day of Feb. 1986, hereby ordered that partial summary decision be entered on behalf of the complainant on the issue of jurisdiction. Since issues of liability and damages are still unresolved in this case, the matter is remanded to the Office of Administrative Law for further proceedings on the remaining issues.

/s/ PAMELA S. POFF

Pamela S. Poff, Director  
Division on Civil Rights

Dated 2/6

**Decision of the New Jersey Office of Administrative Law  
(Miller, J.) Dated December 12, 1985**

**STATE OF NEW JERSEY  
OFFICE OF ADMINISTRATIVE LAW  
INITIAL DECISION  
PARTIAL SUMMARY DECISION**

**OAL DKT. No. CRT 5042-85**

**Agency DKT. No. PL-05-1678, 1679, 1680**

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**SALLY FRANK,**

*Complainant,*

**—v.—**

**IVY CLUB, UNIVERSITY COTTAGE CLUB, TIGER INN, and  
TRUSTEES OF PRINCETON UNIVERSITY,**

*Respondents.*

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**For Complainant: Nadine Taub, Esq. and Sally Frank,  
Esq.**

**For Respondents Ivy Club and University Cottage Club:  
Barbara Strapp Nelson, Esq.**

**For Respondent Tiger Inn: Russel H. Beatie, Jr., Esq. and  
Babette L. D'Amelio, Esq.**

**For Respondent, Trustees of Princeton University: Alexan-  
der P. Waugh, Jr., Esq.**

**For Division on Civil Rights: Nancy Kaplen Miller, Deputy  
Attorney General (Irwin I. Kimmelman, Attorney General of  
New Jersey, attorney)**

**Record Closed: November 26, 1985**

**Decided: December 12, 1985**

BEFORE ROBERT S. MILLER, ALJ:

### STATEMENT OF THE CASE

In this action Sally Frank ("complainant") alleges that respondents—Trustees of Princeton University ("Princeton University"), Ivy Club ("Ivy"), The Tiger Inn ("Tiger Inn"), and The University Cottage Club ("Cottage")—discriminated against her on account of her sex in violation of the New Jersey Law Against Discrimination, *N.J.S.A. 10:5-12(f)*.

Pursuant to *N.J.A.C. 1:1-13.2*, she now moves for partial summary decision on the threshold issue in this case, *viz.*, whether the May 14, 1985 decision made by the Director of the Division on Civil Rights, finding that respondents are subject to the jurisdiction of the Division, is a final agency decision and therefore binding on the Office of Administrative Law.<sup>1</sup>

Subsequent to the making of the motion, respondent Princeton University advised the court and counsel that it was not contesting the decision on jurisdiction insofar as the university was concerned. The other respondents, however, oppose the motion, contending that, on this issue, as well as on all other issues, they have the right to a plenary, trial-type hearing before the Office of Administrative Law.<sup>2</sup>

### PROCEDURAL HISTORY

In the spring of 1979, complainant filed a sex discrimination complaint against respondents with the New Jersey Division on Civil Rights ("the Division"). On June 7, 1979, in a letter to complainant, the Division stated that it had reviewed complainant's allegations and determined that Ivy, Tiger Inn and Cottage were exempt from the New Jersey Law Against

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1 If an agency decision is final, a party aggrieved thereby is not entitled to a *de novo* hearing. His appeal lies to the Superior Court. *N.J.S.A. 52:14B-12*.

2 It is appropriate to note here the extensive, thorough, and overall excellent briefs filed by counsel for complainant and the respondent clubs.



Discrimination because "they are distinctly private, as provided in *N.J.S.A. 10:5-5(1)*." The Division then refused to process her complaint.

On December 19, 1979, complainant refiled her complaint against respondents. She alleged that the clubs were places of public accommodation because they functioned as an arm of Princeton University and therefore were subject to the Division's jurisdiction. She further alleged that the clubs illegally discriminated against her because of her sex.

On January 28, 1980, Ivy, Tiger Inn and Cottage answered Ms. Frank's complaint by denying that the clubs were places of public accommodation affiliated with Princeton University. In addition, as an affirmative defense they claimed that their members' right to freedom of association would be violated if the relief complainant sought were granted.

Respondent Princeton University answered the complaint by denying that it is a place of public accommodation and by asserting that no unlawful act of discrimination had been committed. It was also alleged that Princeton is an institution which is "distinctly private in nature," within the meaning of *N.J.S.A. 10:5-5(1)*, and that the university and each of the three respondent clubs are separate corporations and function as independent entities.

Subsequent to the filing of the second complaint, the New Jersey Division on Civil Rights undertook an investigation. On December 9, 1981, the Division dismissed Ms. Frank's complaint, again holding that Ivy, Cottage and Tiger Inn were *bona fide* clubs distinctly private in nature and thus not subject to the jurisdiction of the Division. The Division's order further stated that there was no probable cause to support the allegation of discrimination filed against Princeton University.

Complainant appealed to the Appellate Division, which, on August 1, 1983, vacated the Division's Final Order of Dismissal and remanded the matter to the Division. While making clear that it was within the agency's discretion to make findings of probable cause and that it was not deciding any substantive issue, the court criticized the agency's lack of precise fact-finding and determined that the complainant "is

entitled to a more formal inquiry as to the factual issues insofar as they relate to jurisdiction. . . ."

On the remand, the Division conducted an extensive investigation that included the examination of voluminous documentation submitted by the parties and two days of fact-finding hearings in which witnesses appeared and testified. The record was kept open for a period of at least 6 months, during which time the parties were able to submit pertinent material. The parties agreed on approximately two hundred stipulations. Each side was given the opportunity to object to factual findings proposed by the Division and to submit its own findings of fact and conclusions of law. Extensive briefs and reply briefs were also submitted.

On May 14, 1985, on the basis of this proceeding, the Director of the Division issued a document entitled "Finding of Probable Cause." That document was divided into two distinct and separate sections. The first, entitled "Jurisdiction," consisted of 49 pages; it contained the Division's determination that the clubs are not "in their nature distinctly private" and concluded that the Division had jurisdiction to entertain the complaints. Section II of the opinion, entitled "Discrimination," consisted of three pages and contained the finding that there was probable cause to believe that the respondent clubs had discriminated and that Princeton University had aided and abetted the discrimination.

Following receipt of the Director's determination of jurisdiction and finding of probable cause, complainant requested that proceedings be transferred to the Office of Administrative Law, and on July 18, 1985 a directive to that effect was issued.

On September 26, 1985, counsel for the parties appeared before the undersigned for a prehearing conference. Among the questions discussed at that conference was the effect of the Director's jurisdictional ruling. This motion for partial summary decision followed.

## THE MOTION FOR SUMMARY DECISION

A. *The Director's Ruling on Jurisdiction*

The dispute at this posture of the case concerns the weight to be accorded to the Director's determination on jurisdiction. The question arises because neither in the 52 page document entitled "Finding of Probable Cause" nor in the transmittal letter to the Office of Administrative Law did the Director state whether she intended that determination to be final (and therefore binding on OAL) or whether it was merely preliminary (and therefore subject to a *de novo* hearing).

For the reasons to be expressed hereafter, I CONCLUDE that the Director's May 14, 1985 determination on jurisdiction should be considered a final agency decision.

1. *The Intention of the Director Was That Her Ruling Be Final*

In contrast to the finding of probable cause,<sup>3</sup> the jurisdictional finding is expressed in final rather than preliminary terms. The Director declared:

After careful consideration of all the evidence presented, the Division finds that the Respondent Clubs are subject to the jurisdiction of the Division on Civil Rights. Despite their separate legal identities, the Clubs' close affiliation with Princeton University and the function the Clubs discharge for the University, leaves the Division to conclude that the Clubs are not 'in [their] nature distinctly private.'

The jurisdictional ruling reflects detailed factual and legal analysis. Its eleven distinct factual conclusions are based on 33 pages of undisputed facts. The jurisdictional holding itself

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3 The probable cause finding consists of a listing of 12 undisputed facts and a single sentence concluding that there is probable cause to believe respondents have violated the pertinent provisions of the New Jersey Law Against Discrimination.

rests on 14 pages of legal analysis. The legal analysis begins with the straightforward pronouncement that the clubs clearly fit within the definition of public accommodations since they sell food for consumption on the premises. It proceeds to analyze the clubs' claim that they are exempt from the Division's jurisdiction because of their private status. The analysis concludes that "the Division rejects the contention that the clubs are distinctly private and therefore exempt from the L.A.D." The decision then proceeds to consider the clubs' contention that their free association rights would not be violated by the assertion of jurisdiction over them. Six pages later, the Director states her unequivocal conclusion: "The Division finds that free association rights would not be violated by the assertion of jurisdiction over these private clubs that are integrally connected with Princeton University."

The Appellate Division, moreover, indicated that the decision of the Director on the question of jurisdiction would be final. The court declared: ". . . we are not here deciding the jurisdictional issue. We are only deciding whether the Acting Director should have determined the important jurisdiction issue in a summary fashion. . . ." The Appellate Division ordered the Director to determine the jurisdictional question after a full investigation and an adequate fact-finding process. From all the available evidence, that is precisely what she did.

Finally, at least until the case reached the Office of Administrative Law, respondents have apparently operated on the assumption that the proceeding before the Division was for the purpose of a final ruling on the issue of jurisdiction. In the Brief which they submitted to the Division, respondents Ivy and Cottage declared:

Now, after nearly 12 months of supplemental investigation, this matter is being submitted to the Director of the Division on Civil Rights for a final ruling as to whether jurisdiction exists.

Similarly, the reply Brief of Tiger Inn stated that it was being submitted "on the sole issue raised by this proceeding: whether the Division has jurisdiction over Tiger Inn under

the Law Against Discrimination." The record also makes clear that respondent clubs participated actively and extensively in the proceedings before the Division and, insofar as I am aware, voiced no objections to the manner in which the proceeding was being conducted or to the anticipated finality of the Division's decision on jurisdiction.

## 2. The "Law of the Case" Doctrine Applies

The judicial doctrine of "the law of the case" requires, under the circumstances here, that the Division's jurisdictional ruling be considered final. This doctrine was thoroughly explained in *State v. Hale*, 127 N.J. Super. 407, 410-411 (App. Div. 1974):

. . . [T]he 'law of the case' doctrine 'applies to the principle that where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of the suit.' *This rule is based upon the sound policy that when an issue is once litigated and decided during the course of a particular case, that decision should be the end of the matter.* 'Law of the case' most commonly applies to the binding nature of appellate decisions upon a trial court if the matter is remanded for further proceedings, or upon a different appellate panel which may be asked to reconsider the same issue in a subsequent appeal. . . .

The doctrine of 'law of the case' is also applied to the question of whether or not a decision made by a trial court during one stage of the litigation is binding throughout the course of the action. The use of the doctrine in this situation avoids repetitious litigation of the same issue during the course of a single trial. With respect to this aspect of 'law of the case' it has been generally stated that *'the "law of the case" concept is merely a nonbinding decisional guide addressed to the good sense of the court in the form of 'a cautionary*



admonition' against relitigation 'when the occasion demands it.' (citations omitted, emphasis supplied)

In my opinion, it is reasonable and necessary to invoke the "law of the case" doctrine here because: (a) the factfinding process at the Division level was careful, thorough and comprehensive; (b) although not strictly a trial-type hearing, the process employed most of the methods thereof, including the presentation of a great deal of testimonial and documentary evidence, cross-examination of witnesses, representation by counsel, oral argument, and an independent and unbiased tribunal; (c) the legal analysis, including the most recent applicable cases of the New Jersey Supreme Court and the United States Supreme Court, was extensive, cogent, well-reasoned, and persuasive; (d) in light of the ample opportunity, of which they availed themselves, given to the clubs to present their cases at the Division level, the application of the doctrine would not be unfair to them; and (e) the process at the Division level took nearly two years to complete, and it would therefore be duplicative, repetitious, time-consuming and wasteful to do it all again.

#### B. Summary Decision

Under *N.J.A.C.* 1:1-13.2(a), a summary decision<sup>4</sup> shall be rendered where "the papers and the discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law."

Summary judgment is a well-established procedural mechanism used to allow efficient resolution of legal issues when there is no genuine issue of material fact. *Monmouth Lumber Company v. Indemnity Ins. Company of North America*, 21 *N.J.* 439 (1956). In the event there is no material factual issue in dispute, the court will rule on the merits of the claim as a matter of law. *Felbrout v. Able*, 90 *N.J. Super.* 587 (App.

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<sup>4</sup> Summary decision is the administrative equivalent of the judicial doctrine of summary judgment.



Div. 1963); *Lang v. N.Y. Life Ins. Co.*, 721 F.2d 118 (3rd Cir. 1983); *Paton v. La Prade*, 471 F. Supp. 166 (D.N.J. 1979). A material fact is one that will make a difference in the result of the case. A question of fact which is immaterial to the resolution of a dispute will not defeat a summary judgment order. *E.E.O.C. v. Westinghouse Elec. Corp.*, 725 F.2d 211 (3rd Cir. 1983, *cert. denied* 105 S.Ct. 92 (1984)).

Summary judgment is designed to discern between real issues deserving trial and feigned issues which merely delay the entry of judgment. See Schnitzer "Civil Practice and Procedure," 10 *Rutgers L. Rev.* 351, 375-378 (1955). It is used to dispose promptly of actions in which there is no genuine issue as to any material fact. *Tyson v. Groze*, 172 *N.J. Super.* 314 (App. Div. 1980); *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 *N.J.* 67 (1954). The purpose of the rule is to eliminate a trial in such cases since a trial is unnecessary and results in delay and expense. *Pfizinger v. Bd. of Trustees of Public Emp. Retirement System*, 62 *N.J. Super.* 589 (Law Div. 1960); *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, *cert denied* 429 U.S. 1038 (1976).

For purposes of the pending motion, the details of the Procedural History, recited above, constitute the material facts. Specifically, no party controverts the following facts, among others: (a) the Division conducted an extensive investigation in order to determine whether it had jurisdiction to decide the merits of the complaint; (b) the investigatory process lasted more than one year; (c) the investigation had many, although not all, of the attributes of a trial-type hearing; (d) during the investigation, the Division examined and considered numerous documents and over 200 stipulations agreed to by the parties; (e) the Division conducted two in-depth fact-finding conferences; and (f) upon the closing of the record, the Division issued a comprehensive decision in which it concluded that it had jurisdiction to entertain the complaint.

There being no material facts in dispute,<sup>5</sup> and complainant being entitled to prevail under applicable legal principles, discussed above, I CONCLUDE that complainant's motion for partial summary decision should be granted.

It is so ORDERED.

#### SUBSEQUENT PROCEEDINGS

A conclusion by the Division that it has jurisdiction over respondents and a finding that probable cause exists to believe that the Law Against Discrimination has been violated is, under the applicable statute (*N.J.S.A. 10:5-1 et seq.*) and regulations (*N.J.A.C. 13:4-1 et seq.*), not automatically dispositive of the case. There still remain the important issues of Respondents' liability or not and, if liability is established, damages.

Under the reasoning expressed above, I CONCLUDE that it was for a determination on these issues that the Director transmitted the case to the Office of Administrative Law. As a contested case, a plenary hearing will be conducted on those two issues, *N.J.A.C. 1:1-3.1 et seq.*, and the parties shall be afforded a full opportunity to present evidence testimonial and documentary—relevant to them.

Pursuant to *N.J.A.C. 1:1-13.3(a)*, and for the reasons previously expressed, I hereby specify that all of the factual findings made by the Director on the jurisdictional issue<sup>6</sup> exist without substantial controversy and shall be accepted by me as presumptively correct. At the hearing, however, the parties may attempt to modify or to supplement them by the presentation of additional evidence.

It is so ORDERED.

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5 Respondents allege the existence of a dispute with respect to the following: an alleged Inter-club Agreement, the nature of the "hat bid" procedure, and the use of club facilities by members of the public. The Director, however, has made clear in her Finding of Probable Cause that these matters were not significant in reaching her decision. Similarly, for purposes of the pending motion any such dispute is irrelevant.

6 These are found under the caption "B. Undisputed Facts," at pages 3-34 of the Finding of Probable Cause dated May 14, 1985.

This recommended decision may be affirmed, modified or rejected by the DIRECTOR OF THE DIVISION ON CIVIL RIGHTS, PAMELA POFF, who by law is empowered to make a final decision in this matter. However, if Pamela Poff does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

I hereby FILE my Initial Decision with PAMELA POFF for consideration.

December 12, 1985  
DATE

/s/ ROBERT S. MILLER, ALJ  
Robert S. Miller, ALJ

**Receipt Acknowledged:**

DATE \_\_\_\_\_

## DIVISION ON CIVIL RIGHTS

**Mailed To Parties:**

DATE  
ml

OFFICE OF ADMINISTRATIVE LAW

## DOCUMENTS IN EVIDENCE

None

**Finding of the New Jersey Division on Civil Rights  
Dated May 14, 1985**

**STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION ON CIVIL RIGHTS**

Docket No: PL 05-1678, PL 05-1679, PL 05-1680

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SALLY FRANK,

*Complainant,*

—v.—

IVY CLUB, UNIVERSITY COTTAGE CLUB, TIGER INN AND  
TRUSTEES OF PRINCETON UNIVERSITY,

*Respondents.*

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**FINDING OF PROBABLE CAUSE**

Whereas on December 19, 1979, Complainant, Sally Frank, filed Verified Complaints in the above captioned matter and after an extensive investigation by the Division on Civil Rights, the Division makes the following findings:

**I. JURISDICTION**

**A. PROCEDURAL HISTORY**

In December of 1979, Ms. Frank filed a Verified Complaint against Ivy Club, Tiger Inn and the University Cottage Club as well as Princeton University alleging discrimination based on sex in a place of public accommodation in violation of N.J.S.A. 10:5-12(f). Respondent Clubs responded to the Complaint by denying that the clubs were places of public accommodation. The three clubs also asserted that their

members' freedom of association rights would be violated if the Complainant was granted the requested relief. In answer to the Complaint, Princeton University denied that the University was a place of public accommodation. Princeton University also claimed the University had committed no discriminatory acts.

On December 9, 1981, after an investigation of the allegations, the Division on Civil Rights (hereinafter "Division") dismissed the complaint against the Respondent Clubs finding that the Clubs were exempt from the public accommodations provisions of the New Jersey Law Against Discrimination (hereinafter "L.A.D.") because the Clubs were "in their nature distinctly private." Pursuant to *N.J.S.A. 10:5-5(1)*, the Division also found no probable cause to credit the allegations of discrimination filed against Princeton University.

Ms. Frank appealed the decision of the Division. On August 1, 1983, the Appellate Division, while taking no position on the merits of the complaint, vacated the decision by the Division and remanded the case for further investigation.\*

On remand from the Appellate Division, the Division on Civil Rights engaged in an extensive investigation. Voluminous documentation was submitted by the parties. Two days of fact-finding hearings were held and witnesses appeared to present evidence. The parties reached agreement on approximately two hundred stipulations. All parties were given the opportunity to submit briefs and reply briefs on the issues involved.

After careful consideration of all the evidence presented, the Division finds that the Respondent Clubs are subject to the jurisdiction of the Division on Civil Rights. Despite their separate legal identities, the Clubs' close affiliation with Princeton University and the function the Clubs discharge for the University, leads the Division to conclude that the Clubs are not "in [their] nature distinctly private."

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\* While the Appellate Division took no position on the merits, its decision clearly suggested the need to reconsider the Division's original conclusion in light of further fact-finding ordered by the Appellate Division.

## B. UNDISPUTED FACTS\*

Princeton University is a private, non-sectarian institution of Higher Education, founded in 1746. [RS1]\*\*. The University is located in Princeton, New Jersey [CS2]\*\*\*. From 1746 to 1968, Princeton University admitted only male students as undergraduates [RS3]. In 1969, the University admitted women as undergraduate degree candidates for the first time [RS24].

Princeton University, from approximately 1803 to 1843, required all undergraduate students to take their meals in commons operated by the college steward [RS4]. In 1843, Princeton University undergraduate students, for the first time, were permitted to board off-campus [RS5]. The Princeton college refectory burned down in 1856 and was closed for fifty years. During that time, all students took their meals in boarding houses that were not affiliated with the college [RS6]. In the mid-1800's several groups of Princeton Students formed "select associations" to reduce the cost of their off-campus living and dining expenses [RS7]. By 1876 twenty five "select associations" or eating clubs were in existence [RS8].

The club system associated with Princeton University, which began with these "select associations", presently consists of thirteen clubs, eight non-selective clubs and five selective clubs. [RS28, 29]. Campus, Charter, Cloister Inn, Colonial, Dial Lodge, Elm, Quadrangle and Terrace are the eight non-selective clubs. These clubs, formerly all male and selective, are now co-ed [RS28]. The non-selective clubs offer social, recreational and dining activities [RS36].

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\* Facts are drawn from stipulations submitted by the parties and agreed to by them, and from documents submitted by the parties. Authenticity of the documents is not in dispute.

\*\* RS refers to stipulations initially submitted by Respondents, as agreed to by all parties.

\*\*\* CS refers to stipulations initially submitted by complainant, as agreed to by all parties.



Admission to the non-selective or open clubs is by a lottery system [RS37].\* Students who are not accepted into the "open club" of their choice are given the opportunity to go through subsequent lottery rounds at any "open club" which has additional available contracts to offer. [RS38].

The five selective clubs are Ivy, Cottage, Tiger Inn, Cap & Gown and Tower [RS29]. The selective clubs also offer social, recreation and dining activities [RS36]. Tower and Cap & Gown accept male and female members [RS29]. From their inception until 1984, all members of Ivy, Cottage Club and Tiger Inn have been male. [RS31].

Membership in the selective clubs is by invitation only [RS30]. Bicker is the term for the process used by the five selective clubs for interviewing and selecting new members [RS53]. Bicker was at one time administered by the sophomore class; this practice, however, ceased in 1978 [RS67]. Since 1978, the sophomore class has not provided direct funding for the Bicker process [RS67]. The process is now totally funded by the individual clubs [RS63].

Since at least 1977, there has been a fall and spring bicker [RS54]. Spring bicker has taken place in late January to early February [RS54]. Fall bicker is an optional activity for selective clubs and is usually restricted to seniors [RS56]. Two purposes of fall bicker are to fill section sizes to their optimal level and provide new members with an introduction to the bicker process [RS57]. Fall bicker is administered entirely by the clubs [Ivy/Cottage (I/C) Appendix at 70, Burchenal Certification; I/C Appendix at 117, Fricke Certification; Tiger Appendix at 149, Rheinhardt Deposition].

Spring bicker is presently coordinated by the Committee on Bicker Administration (C.B.A.). In 1982-83, the C.B.A. had eight members: the bicker representative from each of the selective clubs; the C.B.A. chairman, who was a sophomore selected by the five club representatives; and the C.B.A. chairmen from the previous two years. In 1983-84, the C.B.A. chairman was selected by a committee consisting of

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\* In addition to the lottery, since 1979, the Quadrangle Club requires each student seeking admission to collect the signature of 15 members of the Club during a 3-week period prior to open club sign ups [RS37].

the representative from each of the selective clubs plus last year's C.B.A. chairman; the new chairman then selected six or seven fellow sophomores (both male and female) to constitute this year's C.B.A. [RS64].

The committee that coordinates the spring club selection used without charge, for an unknown period of time prior to 1982, a University office during the week of the selection process from which it administered the process and answered student questions. Since that time, the University has charged rent for the use of such office space. For spring bicker in 1984, the committee chairman used his own dormitory room [CS36].

The rules for bicker change from time to time [RS62]. The major steps in the process include (1) registration; (2) bicker sessions; (3) bid sessions, and (4) sign in [RS71]. Registration for spring bicker, from 1977 to 1980, took place in the Dean of Student Affairs Office. Since 1980, spring bicker registration has taken place at the Tower Club [RS72-73]. Registration consisted of picking up a form, filling it out, and dropping it in a cardboard box [CS31]. Since 1979, the bicker form was provided by the C.B.A.

Bicker sessions, since at least 1977, consist of visits made by the bickerees to each of the selective clubs [RS74]. Bicker sessions are held every night during bicker [RS79]. Two of the purposes of bicker sessions are to give bickerees a glimpse of life at the clubs and to give club members the opportunity to individually evaluate the bickerees as prospective club members [RS78].

The C.B.A. presently devises a standard schedule and attendance rules for bicker sessions. Ivy and Cottage Club set their own attendance rules, usually in conformity with the agreement reached with the C.B.A. [RS75]. Since at least 1977, bicker sessions usually take place on the Sunday, Monday and Tuesday of bicker week with an afternoon makeup session on Wednesday [RS77]. If a bickeree misses a session without an excuse accepted by the C.B.A., he or she will automatically be cut from the club's list and will be ineligible to join the club [RS80]. Prior to 1983, the committee that coordinated spring bicker ensured that, as per the clubs direc-

tions, women bickerees received interview appointments only at the coed selective clubs while men could receive appointments at all selective clubs [CS34].

For a period of time prior to 1983, every man who went through the application process for membership in a selective club and attended every bicker session at each of the selective clubs was guaranteed an opportunity to join at least one selective club. A man not otherwise selected was offered the opportunity to join a selective club which was picked at random by the clubs.\* This was called getting a hat bid [CS23]. The hat bid system was abolished in 1983 [CS23]. A woman was not eligible for a hat bid when the hat bids were in existence [CS24].

A bid session is a meeting of the club members to decide which bickerees will be invited to join a selective eating club [RS85]. A bid is an invitation to join one of the selective clubs [RS84]. There is not a set number of bids that each club is required to offer [RS87], and the process whereby bickerees will be extended invitations to join varies from club to club [RS82]. Since at least 1977, after each bicker session, members of Tiger Inn, Cottage and Ivy submit written comments to their bicker chairman about each bickeree with whom they had significant contact. These confidential comments are read at bid sessions [RS83].

Undergraduate members of Ivy are elected by consensus at a meeting of a majority of its current membership [RS89]. Tiger Inn requires unanimous agreement of their undergraduate members for a sophomore to be admitted [RS90]. Cap & Gown, Cottage and Tower require a 2/3 majority vote of their memberships for a sophomore to be admitted [RS88]. In 1984, 114 sophomores completed bicker at Ivy, 40 received bids and 39 bids were accepted [RS59]. At Cottage Club, 107 sophomores completed bicker, 72 received bids and 69 bids were accepted [RS94]. At Tiger Inn, 112 sophomores com-

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\* According to the Certification of Christie Quick, 1981-82 Chairman of Committee on Bicker Administration, the selective clubs would meet to determine which club would offer a hat bid to an eligible student. During the 1982 spring bicker, one person was eligible for a hat bid. The club chosen to offer the bid was selected by a roll of dice. [I/C App. at 172-73].

pleted bicker, 91 received bids and 70 bids were accepted [RS139]. Cap & Gown had 114 sophomores who completed bicker, 85 received bids and 70 bids were accepted [RS97]. At Tower, 106 sophomores completed bicker, 71 received bids and 69 bids were accepted [RS98].

Once a bickeree has been given a bid and has decided to join a particular club, each club has its own traditional rites for initiating new members [RS101]. New members of the selective clubs traditionally sign in at a ceremony held after bicker [RS102].

Ivy, Tiger Inn and Cottage Club, the three all-male selective clubs, are the Respondents in this action along with Princeton University [Verified Complaint of Sally Frank, 12/19/79]. The Ivy Club was founded in 1879 and filed a Certificate of Incorporation on April 26, 1883 pursuant to an act of the legislature of the State of New Jersey entitled "An Act to Incorporate Societies for Social, Intellectual and Recreation Purposes" [RS9]. Ivy Club's first clubhouse was in Ivy Hall, located at Mercer Street, in Princeton. Ivy Hall was privately owned by Mrs. John R. Thompson, and rented to Club members at a nominal rent beginning in 1877, and continuing until Ivy erected a new clubhouse in 1884 [RS16]. In 1883 Ivy purchased a lot on Prospect Street from Mrs. Mary Olden and erected a frame clubhouse in 1884. No known direct financial assistance was received from Princeton University [RS17].

In 1887, Ivy contracted a New York architect to design an extension to its clubhouse. Ivy raised funds for this project by private subscription and without any known direct financial assistance from the University [RS18]. In the late 1890's, Ivy purchased its present land on Prospect Street for \$13,000 from H.B. Fine to erect its present clubhouse. Proceeds from the sale of the old clubhouse and its land helped finance the purchase of new land and the building campaign. All funds were raised from the membership by subscription without any known direct financial assistance from Princeton University [RS19].

Title to the land and property located at 43 Prospect Street in Princeton, New Jersey is solely in the name of Ivy Club

[RS164]. The Ivy Club pays all local and state taxes on assessed real estate of which it is the sole owner located at 43 Prospect Street, Princeton, New Jersey [RS163]. The Ivy Club pays all maintenance and insurance costs for the property located at 43 Prospect Street, Princeton, New Jersey. Princeton University sometimes plows the snow from the public right-of-way in front of the Ivy Club [RS165]. No snow plowing, ground maintenance or other work is done by Princeton University on any other part of Ivy's grounds or facilities [RS172]. The Ivy Club maintains an account with, and is directly billed by the Public Service Electric & Gas Co., Elizabethtown Water and New Jersey Bell [RS168].

The United States Treasury Department granted Ivy Club tax-exempt status under Section 101(9) of the Internal Revenue Code on October 19, 1942 [RS144]. Since at least 1969, Ivy Club has claimed and presently claims tax-exempt status under Section 501(c)(7) of the Tax Reform Act of 1969 which reaffirmed the exempt status of social clubs organized on a not-for-profit basis [RS146]. Ivy Club has filed Forms 990-T and 990 Federal income tax return for each year from at least 1977 to date [RS149].

From November 1978 to April 1983, Ivy possessed a club liquor license. The license was issued by the Mayor and Council of the Borough of Princeton. Ivy applied for its club license pursuant to the rules and regulations promulgated by the New Jersey Alcoholic Beverage Commission and, in particular, *N.J.A.C.* 13:2-8. Since April 1983, Ivy has not possessed nor has it applied for, a liquor license [CS13a].

Pursuant to the constitution and by-laws of the Ivy Club, the Board of Governors of the Ivy Club has general supervisory powers over the affairs and property of the club [RS124]. The Board of Governors of the Ivy Club is comprised of 18 members; 15 are elected for five-year terms on a staggered basis; one (the undergraduate governor) is elected for a one-year term and two are elected for two-year terms [RS127].

Ivy Club's Constitution authorizes three classes of membership: honorary, graduate and undergraduate [RS191]. The undergraduate membership of the Club consists of three Sec-



tions, members in the Senior Class, members in the Junior Class and members elected from the Sophomore Class. Every undergraduate member of the Club in good standing, upon his graduation from the University or upon his leaving the University before graduation, becomes a Graduate member of the Club. A person who attended Princeton University for at least one academic semester and any person who resigned from Undergraduate membership may be elected a Graduate member. Honorary members are residents of the County of Mercer, in the State of New Jersey elected by at least two-thirds of the undergraduate members, and approved by the Board of Governors. Honorary members remain so for life or until such time as they may resign from such membership. [Ivy Club Constitution].

As of 1984, Ivy Club had 1,500 graduate members, 79 undergraduate members and 39 sophomores who accepted bids [I/C Appendix at 73, Burchenal Certification]. Ivy's Constitution does not require that the clubs' membership be restricted to men [RS186]. The issue of admitting women has never been put to a formal vote of the undergraduate members of Ivy but the general consensus of the Club is that women should not be extended membership [RS188].

The Tiger Inn was founded in 1890 and filed a certificate of incorporation on February 9, 1892 pursuant to an act of the legislature of the State of New Jersey entitled "An Act to Incorporate Societies for Social, Intellectual and Recreational Purposes" [RS11]. Tiger Inn's first clubhouse was located in a private home on William Street which the club members rented with their own funds for \$300 in 1890 [RS12].

In 1894, Tiger purchased the land and realty located at University Place on Prospect Avenue from a private individual without any known direct financial assistance from Princeton University. A deed of the transaction is registered in the County Clerk's Office in Trenton, dated April 20, 1884 [RS13]. Tiger Inn built its present clubhouse located at 48 Prospect Avenue, Princeton, New Jersey, in 1895 without any known direct financial assistance from Princeton University [RS14]. Trenton Trust and Safe Deposit Company held the mortgage on Tiger Inn's present clubhouse [RS15].



Title, to the land and property located at 48 Prospect Street in Princeton, New Jersey is solely in the name of the Tiger Inn [RS158]. The Tiger Inn pays all local and state taxes assessed on real estate of which it is the sole owner located at 48 Prospect Street, Princeton, New Jersey [RS157]. Tiger Inn pays all maintenance and insurance costs for the property located at 48 Prospect Street, Princeton, New Jersey. Princeton University sometimes plows the snow from the public right-of-way in front of Tiger Inn [RS159]. No snow plowing, ground maintenance or other work is done by Princeton University on any other part of Tiger Inn's grounds or facilities [RS172]. The Tiger Inn maintains an account with, and is directly billed by the Public Service Electric & Gas Co., Elizabethtown Water and New Jersey Bell [RS166].

The United States Treasury Department granted Tiger Inn Federal tax-exempt status under Section 101 (9) of the Internal Revenue Code in an authorization dated September 1, 1942 [RS142]. Since 1969, Tiger Inn has claimed and presently claims tax-exempt status under Section 501(c)(7) of the Tax Reform Act of 1969 which reaffirmed the exempt status of social clubs organized on a not-for-profit basis [RS145]. Tiger Inn has filed Forms 990-T and 990 Federal income tax return for each year from 1968 to date [RS148].

From September 1977 to April 1983, Tiger Inn possessed a club liquor license. The license was issued by the Mayor and Council of the Borough of Princeton. Tiger Inn applied for its club license pursuant to the rules and regulations promulgated by the New Jersey Alcoholic Beverage Commission and, in particular, *N.J.A.C.* 13:2-8. Since April 1983, Tiger has not possessed, nor has it applied for, a liquor license [CS13b].

Pursuant to the constitution and by-laws of Tiger Inn, the Board of Governors of Tiger Inn has general supervisory powers over the affairs and property of the club [RS123]. The Board of Governors of Tiger Inn consists of 12 of the graduate members of the Club, all of whom are elected to a term of three years [RS129]. Tiger Inn's Constitution authorizes four types of membership: Active, Graduate, Associate and Honorary [RS189]. The Active members of the Club are

members of the Senior and Junior Classes of Princeton University and "special students rated therewith." The Graduate membership of the Club consists of all Alumni of Princeton University, who were regular Active members of The Tiger Inn at the time when they were graduated or left college. Honorary Membership of the Club consists of persons of prominence, members of the Faculty and of the Board of Trustees, who are elected to Honorary Membership. Associate members consist of all persons not covered in the preceding three classes of membership. They may be graduates, men who left college before graduating, or non-Princeton men [Tiger Inn Constitution]. Tiger Inn's Constitution does not require that the clubs' membership be restricted to men [RS186]. From time to time, however, the undergraduate members of the Tiger Inn have held informal votes on whether to admit females into the Club. In each case the overwhelming majority voted against permitting women to become members [RS187].

The University Cottage Club was founded in 1886 and filed a Certificate of Incorporation on December 10, 1889 pursuant to an act of the legislature of the State of New Jersey entitled "An Act to Incorporate Societies for Social, Intellectual and Recreational Purposes" [RS10]. Cottage Club's first clubhouse was a small wooden house on Railroad Avenue, (now University Place) Princeton, which the members leased starting in 1886 [RS20].

On or about 1892, Cottage purchased its present lot situated on Prospect Street, Princeton, New Jersey and erected a clubhouse [RS21]. In 1904-1905, Cottage Club's present clubhouse was financed from private, non-University funds [RS22]. Cottage Club received no known direct financial assistance from Princeton University for the leasing or construction of any of its clubhouses [RS23].

Title to the land and property located at 51 Prospect Street in Princeton, New Jersey is solely in the name of the Cottage Club [RS161]. Cottage Club pays all local and state taxes assessed on real estate of which it is the sole owner located at 51 Prospect Street, Princeton, New Jersey [RS160]. Cottage pays for all maintenance and insurance costs for the property

located at 51 Prospect Street, Princeton, New Jersey. Princeton University sometimes plows the snow from the public right-of-way in front of Cottage Club [RS162]. No snow plowing, ground maintenance or other work is done by Princeton University on any other part of Cottage Club's grounds or facilities [RS172]. The Cottage Club maintains an account with, and is directly billed by the Public Service Electric & Gas Co., Elizabethtown Water and New Jersey Bell [RS167].

The United States Treasury Department granted Cottage Club tax-exempt status under Section 101(9) of the Internal Revenue Code in an authorization dated September, 1982 [RS143]. Since at least 1969, Cottage Club has claimed and presently claims tax-exempt status under Section 501(c)(7) of the Tax Reform Act of 1969 which reaffirmed the exempt status of social clubs organized on a not-for-profit basis [RS147]. Cottage Club has filed Forms 990-T and 990 Federal income tax return for each year from 1977 to date [RS150].

From September 1977 to June 1981, Cottage possessed a club liquor license. The license was issued by the Mayor and Council of the Borough of Princeton. Cottage applied for its club license pursuant to the rules and regulations promulgated by the New Jersey Alcoholic Beverage Commission and, in particular, *N.J.A.C.* 13:2-8. Since June 1981, Cottage has not possessed, nor has it applied for, a liquor license [CS13c].

Pursuant to the constitution and by-laws of the Cottage Club, the Board of Governors of the Cottage Club has general supervisory powers over the affairs and property of the club [RS125]. The Board of Governors of the Cottage Club is composed of 25 members who hold office for a three year term. It is comprised of: the President, Vice-President, and Financial Secretary of the Club who now serve *ex-officio*; 22 graduate or associate members of whom at least 14 must be graduate members [RS128].

Cottage Club's Constitution authorizes six classes of membership: Active, Graduate, Inactive, Associate, Honorary and Faculty [RS190]. Any regular or special member of the Soph-

omore, Junior or Senior Class of Princeton University in good standing is eligible to be elected as an Active member. Every one who has been an Active member shall, upon graduation of his class from Princeton University, become a Graduate member unless he remains an Active member by continuing as a resident member of Princeton University and designating his desire to remain active with the Secretary.\* Any Active member who leaves Princeton University prior to the graduation of his class, shall upon severing his connection with the University, become an Inactive member. Any person who was a Resident member of Princeton University and whose class has graduated is eligible to election as an Associate member. Members of the Faculty of Princeton University, whether Graduates of the University or not, shall be eligible to election as Faculty members. "Any distinguished gentlemen who have not been Resident members of Princeton University shall be eligible to election as Honorary members" [Cottage Club Constitution].

As of 1984, Cottage Club had 2,110 graduate members, 128 undergraduate members and 68 sophomores who had accepted bids [I/C Appendix at 119, Fricke Certification]. Cottage Club's Constitution does not require that the clubs' membership be restricted to men [RS186]. From time to time, the undergraduate members of the Cottage have held informal votes on whether to admit females into the Club. In each case, the overwhelming majority voted against permitting women to become members [RS187].

The general public is not invited to join Tiger Inn, Cottage or Ivy [RS108]. Tiger Inn, Ivy and Cottage each require their undergraduate members to pay an initiation fee together with a yearly fee for board and social activities. All fees are paid by the student directly to the clubs [RS138]. These fees are not part of Princeton University's undergraduate tuition

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\* "The term 'Resident member of Princeton University' embraces every person who shall have been matriculated in said University or its predecessor 'The College of New Jersey' as a regular or special undergraduate student." [Cottage Club Constitution].

[RS139].\* Membership dues and contributions to Ivy, Cottage, and Tiger Inn are not tax deductible as contributions to educational institutions [RS154]. Respondent Clubs provide food for consumption on their premises by contract with club members in which the club agrees to provide specific meals to their members for specific sums. Club members who bring a guest to dinner will be charged by the Club for the guest's meal unless the guest holds a University dining contract and both the club member and the guest utilize the Meal Exchange Program [CS12]. Graduate members may eat at the clubs on a per meal basis whenever they desire [I/C Appendix at 69, Burchenal Certification; I/C Appendix at 116, Fricke Certification]. Alcoholic beverages are served at times at the clubs to club members and their guests [CS13d]. Each of the Respondent Clubs has a library which is for the exclusive use of club members and their guests [CS37].

Respondent Clubs at times have paid for and placed announcements in *The Daily Princetonian* similar to those attached in Appendix A which advertise bicker, open house events and parties [CS10]. Some are addressed specifically to sophomores while others are a more general invitation to Princeton University students [Appendix A]. The clubs also are rented out from time to time to club members or their relatives for private non-club functions which are attended by non-members [Transcript of April 3, 1984 at 26-31, Testimony of Reed].

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\* Financial aid awards by Princeton University are made directly to the students, not to the Clubs [RS140]. The University's office of Undergraduate Financial Aid initially calculates financial aid on the basis of a standard budget which includes a board rate based upon a University twenty meal contract and a standard allowance for books and other personal expenses. An undergraduate student receiving financial aid may receive additional funds in the form of a loan to cover the added cost of a club meal contract. [Answer to Verified Complaint by Respondent, Trustees of Princeton University dated January 29, 1980 at p.8]. In the 1982-83 academic year, 39 students had budget increases relating to club membership, totalling \$19,740. In 1983-84 academic year, 66 students had club related increases, totalling \$37,243. Increases in financial aid are also available for other educational expenses such as additional books, senior thesis research, and study abroad [Memo from Don M. Betterton of 1/20/84].



Tiger Inn, Ivy and Cottage are managed by stewards who are not employees of or students at Princeton University [RS179]. Persons whose services are retained by Tiger Inn, Ivy, and Cottage are employees of the Clubs and not Princeton University [RS176]. The Respondent Clubs contribute to Social Security for their employees, and pay them a weekly salary [RS178]. Ivy, Cottage and Tiger Inn each have their own IRS Employer Identification Number distinct from Princeton University's Employer Identification Number [RS152]. Employees of the clubs are not covered by University provided benefits such as health insurance, pension plans, Social Security contributions, etc. [RS177].

Ivy, Cottage and Tiger Inn use zip code 08540. The zip code 08544 is only used by Princeton University [RS183]. Respondent clubs do not have campus mail delivery, [RS184], nor can they use Princeton University's non-profit mailing permit [RS185].

Princeton University requires all freshman and sophomore students to have University dining contracts [RS40]. Upper-class students are given a wider choice of dining options [Student Guide to Princeton 1978-79]. These options include a University contract, independence and eating clubs [*Id.*]\*. Students are in part informed of these options through various Princeton University publications [*Id.* See also "Choices"; "Princeton University Admissions Information";, "Princeton University Profile"].

Sophomore students, from at least 1977 until 1981, received "Choices," a booklet published by a committee of the Sophomore Class, the Upperclass Choice Committee, using class dues.\*\* This booklet is distributed to all sopho-

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\* Upperclass students who choose not to hold a meal contract at any facility are designated "independents." Under this option students make their own dining arrangements. Independents may choose to join a co-op at Two Dickinson or Brown Hall, where students share cooking and shopping responsibilities [Princeton University Admissions Information, 1979-80 at 30].

\*\* The Upperclass Choice Committee is created each year by the Sophomore Class to apprise sophomores of the dining options available to them for their upperclass years. It is funded by the Sophomore Class. The Sopho-



mores to help them decide which dining, residential and social options to select. For an uncertain period of time prior to 1978, the Dean of Student Affairs Office contributed to "Choices" financial support. After 1978, the booklet has been funded entirely by Sophomore Class dues [CS26]. Presently, the Upperclass Choice Committee publishes "Princeton's Guide to Academics and Social Life" a booklet which provides information on the academic majors, dining options and residential arrangements available to the junior and senior students [CS26].

Princeton University juniors and seniors generally dine in one of the following ways (figures are for 1983-84): DS (dining service) contracts (191); club membership (1570); living off-campus (98); living in Spelman Hall, apartment-style with kitchens (156); living at 2 Dickinson Street and participating in the co-op there (20); and living in other upperclass residential halls and eating in an undetermined manner (194) [RS50]. Adlai Stevenson Hall is a University-operated facility consisting of two buildings at 83 and 91 Prospect Street. It was originally founded in 1970 after the University purchased the facilities of Court and Key & Seal Clubs, both now defunct [R39].\* Any junior or senior may hold a meal contract at

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more Class' source of funds for expenses is class dues. The level of class dues is determined by the Office of the Dean of Students, in consultation with students. The University includes class dues in the overall bill students receive on a quarterly basis. The dues are collected by the University and turned over to the Sophomore Class on a quarterly basis. The Sophomore Class maintains these funds partially in a non-interest-bearing University account and partially in its own checking account (statements concerning which are returned to the University Controller's Office). With the approval of the Office of the Dean of Students, a student may elect not to pay class dues [Letter dated May 16, 1980 from Laura C. Ford to Susan L. Reisner, Appendix to Appellate Brief of Sally Frank at 42].

\* Stevenson Hall charges its members a social fee and sponsors a wide range of activities; it has two dining halls, one is strictly kosher [RS41]. With the exception of freshman and sophomores desiring a kosher meal contract, Stevenson Hall meal contracts are presently (1984) only available to juniors and seniors [RS42]. In 1983-84, 75 students have meal contracts for the non-

Stevenson Hall. In addition, a limited number of juniors and seniors may hold a meal contract at each of the residential colleges. Some of these are "Resident Advisors" (RA's), appointed to counsel freshmen and sophomores. Others are selected through a "college lottery" system, under which a small number of upperclassmen are allowed to continue to reside in the residential college where they resided as underclassmen. The numbers for 1983-84 are as follows:

|             |    |                    |        |
|-------------|----|--------------------|--------|
| Butler      | 19 | (including 12 RAs) |        |
| Mathey      | 23 | (including 13RAs)  |        |
| PIC         | 33 | (including 10 RAs) |        |
| Rockefeller | 18 | (including 13 RAs) |        |
| Wilson      | 29 | (including 12 RAs) | [RS50] |

The Princeton University Department of Food Services has no figures concerning "maximum capacity" for their dining facilities. They were able to provide the seating capacity for each facility, as set forth below. Of course, each seat could be used multiple times during a single meal period.\*

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1983-84 the regular (non-kosher) dining facility at Stevenson Hall can accommodate approximately 150 meal contract holders [RS44]. Unlike club employees, all employees of Stevenson Hall are employees of Princeton University and are eligible for University benefits [RS45]. University proctors are responsible for the security at Stevenson Hall and patrol the grounds there on a regular basis [RS47].

\* According to a memo from Joan S. Girgus dated February 22, 1982, the preferable ratio of spaces to students would be 3:5 although food consultants had suggested that 1:2 would be manageable [Memo from Joan S. Girgus to Ad-Hoc Advisory Group on College Membership, February 22, 1982]. In 1983-84 academic year, 2856 students had University dining facility meal contracts. [Tennyson Affidavit at 1. Princeton University had a total enrollment of 4524 students that year [I/C App. at 176].

|              |             |        |
|--------------|-------------|--------|
| Butler       | 180         |        |
| Mathey       | 249         |        |
| PIC          | 240         |        |
| Rockefeller  | 268         |        |
| Wilson       | 258         |        |
| 83 Stevenson | 80 (kosher) |        |
| 91 Stevenson | 99 (kosher) | [RS49] |

Twenty dormitories contain kitchens for use by students who cook for themselves. Of these, eleven are located in upperclass areas. Eight are "full kitchens" and three are snack kitchens [RS52].

The club system has consistently been the most popular eating option available to upperclass students [Choices, 1982 at 34]. In school year 1983-84, 1570 out of 2230 of Princeton's juniors and seniors ate at one of the following clubs: Campus, Cap & Gown, Charter, Cloister, Colonial, Dial, Elm, Ivy, Quadrangle, Terrace, Tiger Inn, Tower, University Cottage [CS27].

Three meal exchange programs exist between the University food services and Respondent Clubs.\* [Answer to Verified Complaint by Respondent, Trustees of Princeton University p.4, dated January 29, 1980]. The general Meal Exchange Program allows students to dine with their friends at other facilities at no additional cost. The Program is administered, and all costs are jointly shared by the Inter-club Council and the University's Department of Food Services [*Id.*]. The general Meal Exchange Program works as follows: If a club member invites a Princeton student having a University dining contract to a meal at his club as his guest, and the guest reciprocates and invites the club member to dinner at a University dining facility within one calendar month, neither party will be charged for the guest's meal. If no reciprocal

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\* These meal exchange programs are available with all the open and selective clubs. No meal exchanges are possible for students without Club or University contracts—i.e. independents [Transcript at 133, March 12, 1984, Testimony of Rigger].

meal is exchanged within one month, the sponsor will be charged for the guest's meal by his club or the University [RS115]. Brown Co-op and 2 Dickinson are specifically excluded from this program [I/C App. at 74].

The Upperclass Choice Meal Exchange provides sophomore class members with the opportunity to eat in facilities they may select for their junior year without the expenditure of additional funds. The meal exchange operates during the fall from the first Monday of November through the first Thursday in December. The precise dates are established mutually by the Upper Class Choice Committee and the University Department of Food Services. (The 'dates for 1983 were November 7 through December 1). The program requires that reservations be made through a meal exchange hot line which may be called during hours established by phone only and not in person. Reservations must be made 48 hours in advance with reservations for Monday meals being made on Thursday [CS32, Appendix C].

The program is for dinner meals, typically Monday through Thursday. Each dining option facility may limit the number of openings and evenings available. These numbers and day limitations are listed and made available to Sophomore Class members. The UCC advises all Sophomores through the "Daily Princetonian" and by individual letter. Brown Co-op and 2 Dickinson are specifically excluded from the transfer of University DFS Funds [*Id.*].

Records are maintained by the Upperclass Choice Committee. These records indicate student names, student social security numbers, date and meal eaten, and the facility where the meal was taken. Tallies are collected daily and deposited at the Department of Food Services, 106 Alexander Street. Individual diners present meal cards at the facility they are visiting. The Sophomore Class supplies to the Department of Food Services the records maintained by the Upperclass Choice Committee. The Department of Food Services then reimburses the individual clubs per dinner meal for contract holders who participate in the program. The cost for the academic year 1983 was \$1.90 [*Id.*]. Under this program,

"[d]ue to limited space, girls cannot eat at all male eating clubs" ["Choices," 1979 at 33].

The Sophomore Club Meal Participation Program allows sophomores who are new club members to dine at a club during the spring semester of their sophomore year. [Answer to Verified Complaint by Respondent, The Trustees of Princeton University p.4, dated January 29, 1980]. The University reimburses the club a percentage of the University food costs for the meal [Transcript at 175, Mar. 12, 1984, Testimony of Harrison]. At Ivy, the sophomore member is charged the difference between the University's reimbursement and the club's charge for the meal [Transcript at 52, April 3, 1984, Testimony of O'Malley].

The pamphlet *Rights, Rules and Responsibilities*, is published by Princeton University and sets forth Princeton University's disciplinary rules and procedures governing student behavior [CS8]. The 1982 pamphlet included a specific section entitled "Conduct at Prospect Street Clubs" [*Rights, Rules and Responsibilities* at 26]. The regulations in that section are said to be based on the Interclub Agreement. The section presents excerpts from the terms of the Interclub Agreement, an agreement which establishes a cooperative arrangement for discipline of undergraduate students who violate standards of conduct. The

standards of behavior at individual clubs are to conform with established standards in the University as a whole. In particular, club members are to act with considerate regard for the rights, privileges, and sensibilities of others. It is expected that they will show due consideration for the property of their fellow members and guests, as well as for the property of the club itself. Physical violence, intimidation of others, or offensive and disorderly behavior will not be tolerated, in any club, or on the walks and streets outside the clubs [*Rights, Rules and Responsibilities* at 26].

University proctors are not responsible for the security at Tiger Inn, Cottage or Ivy and do not regularly patrol the



clubs' grounds or premises [RS48]. Princeton University students involved in off-campus altercations are subject to discipline by the University [RS133].\* Princeton University has no authority to discipline a graduate member of Tiger Inn, Ivy or Cottage for objectionable conduct by that graduate member on the Club's premises [RS135]. Tiger Inn, Cottage and Ivy discipline their own members for disturbances connected with the Clubs regardless of whether any action was taken by public or University authorities [RS132].

On two occasions since 1977, club officers have been disciplined by Princeton University for the conduct of their members in the club or at club functions; one of those instances involved one of the three defendant clubs in the instant proceeding. It is no longer the University's policy to discipline club officers' *ex officio* for the conduct of club members [CS22].

From at least 1977, Tiger Inn, Ivy and Cottage have not been listed as officially recognized student organizations by the Dean of Students of Princeton University [RS109]. Princeton University does not presently provide any assistance to Tiger Inn, Ivy and Cottage in their fund-raising efforts [RS180]. However, the Princeton University Alumni Records and Mailing Services ("ARMS") makes certain services available to University alumni, including supplying updated mailing lists and doing mailings. There is a single rate sheet for all such services, applicable alike to the eating clubs and to other outside organizations. Tiger Inn, Ivy and Cottage have used some of these services [RS181].

A review of submitted documents from the late 1960's and mid-1970's give some indications of the relationship between Princeton University and the Clubs during two time frames—just prior to the admission of women to Princeton University in 1969 and just prior to Sally Frank's admission to Princeton in 1976. In 1967, as part of the Minutes of the May 1,

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\* Between the years 1977 through 1984, 52 incidents for which disciplinary sanctions were imposed occurred off-campus. Of those, eleven occurred on club grounds. In these 52 incidents, 62 students were penalized, 16 of these students were penalized for incidents on club grounds [CS21, Appendix B, page 3].



University Faculty Meeting, an Interim Report of the Subcommittee of the Faculty Committee on Undergraduate Life appears. The relationship between the University and the Clubs is described as follows:

The University itself provides no dining facilities for most upperclassmen but sanctions the private eating clubs as virtually the only dining and recreational facilities regularly made available to approximately ninety per cent of the upperclassmen. There are not alternatives in suburban Princeton or in the Wilson Society that could accommodate a large percentage of those undergraduates.

Once considered tangibly "off" campus, the clubs are now visibly "on" it, surrounded by the Woodrow Wilson School, 185 Nassau Street classroom building, the University Press, the Engineering School, the Alumni Council building, Ferris Thompson faculty housing, the projected computer center, the residence of the Dean of the Chapel, the buildings (formerly eating clubs) at 5 Ivy Lane and 70 Washington Road, the astro-physics building, and the Religion and Philosophy Departments. Yet the University does not own the clubs or their land, and it does not manage their operations or purchase their supplies. Those alumni members who currently pay club dues, and any who have contributed to the purchase of the club buildings in the past, underwrite a portion of the costs of the facilities that are utilized chiefly by the undergraduates. The quality of the food, the physical facilities, and the activities vary from club to club.

The University's responsibility for the utilization of the clubs by the undergraduates is revealed in many ways. Resolutions of the Trustees have established their jurisdiction over undergraduate membership in the clubs. A week's recess is allowed in the University calendar each year for Bicker. Information on Bicker is provided for sophomores with the assistance of the office of the Dean of Students, who exercises some supervision

over the proceedings. Conduct of the undergraduate members within clubs is regulated by the University under the Gentleman's Agreement which delegates responsibility for enforcing its provisions largely to the undergraduate members and the officers of the individual clubs, under the supervision of the Undergraduate Interclub Committee. University regulations govern the board payment of scholarship students, and the University endorses an agreement that protects the financial stability of the clubs as a group by limiting the size of the membership in any one of them. The University Health Services are implementing their proposal for the inspection of club kitchens. Intramural sports for upper-classmen are organized on the basis of the clubs (and the Woodrow Wilson Society).

In sum, the University and the clubs are now mutually dependent on each other. The clubs depend on the University for an annual supply of undergraduates that virtually insures the continuance of the system; the University depends on the clubs for dining and recreational facilities. In the past, the University has exercised its responsibility for providing these facilities to upper-classmen largely by delegating it, with a minimum of surveillance and a minimum of initiative to improve the clubs. [MINUTES OF THE UNIVERSITY FACULTY MEETING OF MAY 1, 1967].

In 1973, the University proposed to the clubs a jointly funded study of the club system by Haskins and Sells. The purpose of the Study was "to outline all of the options available to develop a system of operation that would be financially and socially viable to the clubs and to the University" [Executive Committee Minutes of Dec. 7, 1973]. The University offered to pay for at least part of the cost of the study [*Id.*]. In February of 1974, Haskins and Sells began a study of the clubs [Executive Committee Meeting Minutes of May 10, 1974].

At the June 9, 1975, Board of Trustees meeting, the Subcommittee on the Clubs presented a Progress Report to the Board. The Subcommittee met with the Graduate InterClub Council (GICC),\* the Undergraduate InterClub Council (UICC),\*\* the Undergraduate Life Committee and the Executive Committee of the Alumni Council prior to issuing the Progress Report [Progress Report at 3]. The Report noted that:

The GICC suggested that the Board adopt a resolution expressing its support for the eating clubs. They felt that it could be of tremendous help to them in soliciting alumni and perhaps undergraduate support. The Subcommittee feels that it would be useful to create a positive atmosphere between the University and the clubs during this period of discussion and analysis. Lastly, we feel that the submission of the Board of this report provides an appropriate setting in which the Board might adopt such a resolution [Progress Report p.5].

A resolution of support of the club system was unanimously approved by the Board of Trustees [Minutes, June 9, 1975].

The Haskins and Sells Study, which was released in April of 1975, was also discussed in the Progress Report of the Subcommittee on Clubs. The Progress Report included the following points made by the study:

1. The Clubs are no longer the only eating and social options available to upperclassmen.
2. The Clubs' financial problems are severe.
3. No quick or easy solutions exist to the financial problems facing the 11 clubs.\*\*\*

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\* The GICC is comprised of the graduate club presidents [*Rights, Rules and Responsibilities*, 1982 at 26].

\*\* The UICC is comprised of the undergraduate club presidents [*Id*].

\*\*\* The eleven clubs consisted of four non-selective clubs (Campus, Colonial, Dial and Terrace) and seven selective clubs (Cap & Gown, Charter, Cottage, Ivy, Quad, Tiger and Tower) [Haskins and Sells Study].

4. The option of letting present market forces operate would probably decrease the number of clubs from 11 to 8. This option, however, would not be without cost to the University. The costs would include possible loss of vitality leading to further erosion of club membership; University purchase of the property to preserve the geographical integrity of the academic community; once purchased, a demand for the use of the building. A substantial decrease in club members without increases in independents would require either further expansion of the University's food service capacity or major revamping of class scheduling and dining facility assignments in order to accommodate the lunchtime demands [Progress Report at 3].

The Progress Report also pointed out that the Haskins and Sells Study had set forth a long list of options for dealing with the problems facing the club system. "These options fall into three general categories; options requiring University policy changes, options involving only the clubs and options requiring ongoing University involvement with the Clubs" [Progress Report at 3].

By October 23, 1975, short-term actions taken by the University to assist the clubs included help in the collection of overdue accounts, the June Trustee Resolution and planning for club participation in the freshman orientation program [Minutes of the Committee on Student Life of the Board of Trustees, October 23, 1975].

In the final Report of the Princeton University Trustee Committee on Eating Clubs of April 2, 1976, the following were noted as actions that had been taken by the University [Final Report at 6]:

1. Systematic exploration of the options Haskin & Sells had outlined.
2. Adoption of the Board of Trustee resolution "reaffirming the University's view that the Club system provides an important social option for undergraduates and expressing again the sense of the Board that

- ' this form of social alternative should continue to be available.'
3. "The Office of the Dean of Student Affairs has assisted the clubs in collecting overdue bills from their members."
  4. "The new student handbook includes a description of the club system."
  5. "Arrangements were made for a presentation on the clubs to be a part of the freshman orientation, and this proved to be quite successful."
  6. "Assistance is being provided to the clubs for snow removal from their front sidewalks by University personnel."
  7. "The University's centrex phone extensions are now available to the clubs."\*
  8. "The University has explored, and proposed to the clubs, the use of an expert in an investigation of whether or not significant savings can be achieved by a joint club insurance program."\*\*
  9. "There has also been made available to the clubs an opportunity to participate in a University food purchasing program so as to achieve for the clubs the savings that arise from bulk purchase of certain items which all clubs use."\*\*\*

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\* The dimension telephone system (Centrex) of Princeton University has one limited access telephone in each club for which the clubs are billed on a monthly basis by the University Comptroller and for which they pay Princeton University the same amount that New Jersey Bell charges Princeton University [RS169].

\*\* No evidence has been submitted to suggest that Respondent Clubs ever participated in such a plan.

\*\*\* Ivy Club does not buy food or non-food items from the D.F.S. at Princeton University [RS173]. In 1979, Cottage Club bought \$166.64 worth of paper products from Princeton University [RS174]. Tiger Inn did at one time purchase food and non-food items from Princeton University which involved payment of a 20% surcharge added to the price paid by the University to outside vendors [RS175].



In September of 1976, Sally Frank began attending Princeton University [RS103]. She was a student at Princeton University from September 1976 through June 1980, when she graduated [RS103].

From September 1976 through June 1980, when she graduated, petitioner, Sally Frank, did not join any of the non-selective eating clubs [RS104]. During spring 1979 bicker, Sally Frank was permitted to bicker at the Ivy Club. However, she was told by Ivy's president that she could only speak to Ivy members when there were no sophomore men waiting to speak to Ivy members. Sally Frank spoke to at least one club member at each of the bicker sessions. She did not receive a bid from Ivy [RS106]. During spring 1979 bicker, Sally Frank bickered at Tower Club and Cap & Gown.\* She did not receive a bid [RS105]. During spring bicker of 1980, Tiger Inn, Cottage and Ivy refused to permit Sally Frank to bicker [RS107].

### C. CONCLUSIONS

The following are conclusions based on the undisputed facts discussed above.

1. A club system provides dining facilities for a majority of upperclass students attending Princeton University.
2. Respondent clubs are part of this club system associated with Princeton University.
3. Princeton University relies on these clubs to feed a majority of their upper class students.
4. Without the clubs, Princeton University would incur substantial costs and would have to make major changes in the provision of dining services for upper class students.
5. Princeton University has an interest in the continued viability of the club system and has taken actions based on that interest.

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\* The reply brief submitted by the complainant states that Ms. Frank bickered at Tower and Cap & Gown in Spring, 1980 not Spring, 1979. [Reply Brief dated 11/12/84 at 1]. The date, however, is not material to any conclusions reached by the Division.



6. The clubs are characterized by the clubs and Princeton University as servicing Princeton students and recruit members almost exclusively from Princeton University.
7. The clubs work with one another and with Princeton University through organizations like the C.B.A. and the Interclub Council.
8. The link that ties the individual clubs together is their association with Princeton University.
9. The clubs could not continue in their present form without Princeton University.
10. Princeton University and the clubs are integrally connected in a mutually beneficial relationship.
11. Non-members of respondent clubs, particularly but not exclusively, Princeton University students, can participate in many of the respondent clubs activities and use the respondent clubs facilities.

#### D. LEGAL ANALYSIS

*N.J.S.A. 10:5-1 et seq.*, the New Jersey Law Against Discrimination (hereinafter *L.A.D.*), guarantees to all persons "the opportunity to . . . obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation . . . without discrimination because of race, creed, color, national origin, ancestry, age, marital status or sex, subject only to conditions and limitations applicable alike to all persons." *N.J.S.A. 10:5-4*.<sup>\*</sup> The statute makes it illegal for "any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold or deny to any person any of the accommodations, advantages, facilities

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\* Although the complaint before the Division is based on sex, as the Court noted in *Nat. Org. for Women v. Little League Baseball* "[i]f this organization were not deemed a place of public accommodation it would be free to discriminate on the basis of race or religion as well as sex." 127 *N.J. Super.* 522,530 (App. Div. 1974).

or privileges thereof" based on the protected criteria. *N.J.S.A.* 10:5-12(f).

The statutory definition of a place of public accommodation includes "any restaurant, eating house or place where food is sold for consumption on the premises." *N.J.S.A.* 10:5-5(1). Respondent Clubs clearly fit within the definition since "food is sold for consumption on the premises" [CS12]. The Clubs, however, contend that they are exempt from the public accommodations provisions of the L.A.D. because the definition excludes a "bona fide club . . . which is in its nature distinctly private." *N.J.S.A.* 10:5-5(1). The issue the Division must address, therefore, is whether the Clubs fit within this exemption.\*

In determining whether a place is a public accommodation or is "in its nature distinctly private," the Division and the New Jersey courts have closely scrutinized the nature and operation of the organization. *See, e.g., Clover Hill Swimming Club v. Goldsboro*, 47 *N.J.* 25 (1966). No simplistic test can be applied. *See Nat. Org. for Women v. Little League Baseball*, 127 *N.J. Super.* at 531 (being non-profit or a membership organization doesn't make organization private); *Clover Hill*, 47 *N.J.* at 34 (requiring approval of new members doesn't make organization private). All the facts must be carefully reviewed so that "[n]o device, whether innocent or subtly purposeful, can be permitted to frustrate the legislative determination to prevent discrimination". *Clover Hill*, 47

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\* Respondent, Princeton University has maintained that the Division also lacks jurisdiction over Princeton University. *N.J.S.A.* 10:5 5(1) specifically includes "any . . . college and university" within the definition of a public accommodation. Princeton University's status as a public accommodation was affirmed by the New Jersey Supreme Court in *Peper v. Princeton University Board of Trustees*, 77 *N.J.* 55, 67 (1977). Princeton University's contention, therefore, that the Division lacks jurisdiction over the University is entirely without merit. Princeton University could, under the L.A.D., use sex as a criterion in the admission of students, *N.J.S.A.* 10:5-5(1), and in fact did not admit women until 1969. However, once Princeton University has made the decision not to use sex as a criterion of admission, the University cannot then "refuse, withhold from or deny" to any student "the advantages, facilities or privileges of the University" on account of sex. *N.J.S.A.* 10:5-12(f).

*N.J.* at 34 quoting *Jones v. Haridor Realty Corp.*, 37 *N.J.* 384, 396 (1962).

Complainant suggests that the parameters of the private club exemption are coextensive with the constitutional protections for free association [Complainant's Brief at 11]. Respondents suggest that the Division apply the test which has been developed to define a "private club" under federal civil rights statutes [Ivy/Cottage Brief at 23; Tiger Inn Brief at 15]. The Division, however, need not determine the outer parameters of the private club exemption under *N.J.S.A.* 10:5-12(1) to resolve the issue here. Instead, the Division looks to "a significant body of authority supporting the proposition that associations that ordinarily would be exempt from laws applying to public or commercial enterprises will lose that exemption if they alter their purely private character in some significant manner." *Franklin v. Order of United Commercial Travelers*, 590 *F. Supp.* 255, 260 (D. Mass. 1984).

One significant form of alteration which courts have focused on is a close association with a non-exempt organization or institution. See, e.g. *Adams v. Miami Police Benevolent Ass'n*, 454 *F.2d* 1315 (5th Cir.) *cert den.*, 409 *U.S.* 843 (1972) (association held subject to 42 *U.S.C.* § 1983 based in part on membership by large percentage of police officers and solicitation of new members by fellow officers on the job); *Franklin v. Order of United Commercial Travelers*, 590 *F. Supp.* 255 (D. Mass 1984) (fraternal benefit society is not exempt from state anti-discrimination law based on close affiliation with city police department and benefits received from this consensual association); *Hebard v. Basking Ridge Volunteer Fire Dep't*, 164 *N.J. Super.* 77 (App. Div. 1978) (connections between fire company and municipality and in particular the function the fire company served for municipality made company not exempt from L.A.D. as non-profit fraternal or charitable corporation). Based on the undisputed material facts and the conclusions drawn from those facts, the Division finds that Respondent Clubs have significantly altered their purely private character through their close asso-

ciation with Princeton University. The clubs, therefore, are not in their nature distinctly private.

When a "private" organization is held out as serving patrons of a place of public accommodation and the place of public accommodation relies on that "private" organization to provide those services, the "private" organization has significantly altered its purely private character in a way that negates any claim of being "distinctly private". See *Hebard v. Basking Ridge Volunteer Fire Dep't*, 164 N.J. Super. 77. This result is necessary so that places of public accommodations "cannot avoid and undermine the law with respect to providing . . . services" by structuring the provisions of those services in a particular manner. *Hebard*, 164 N.J. Super. at 84.

The analysis suggested by the cases cited above is analogous to a provision in Title II, the federal public accommodation statute. 42 USCA § 2000(a). Although Title II is narrower than the L.A.D., both in the scope of prohibited bases of discrimination, e.g., sex is not a prohibited basis under Title II, and in the definition of what is a place of public accommodation, e.g. a University is not a place of public accommodation under Title II, Title II reaches establishments integrally connected with places of public accommodation. 42 U.S.C.A. § 2000a(b)(4) covers

"any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment."\*

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\* The L.A.D. does not have a specific statutory provision which is analogous, however, the L.A.D. has a much narrower private club exemption. Title II exempts all "private clubs" except "to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) [the definition of a public accommodation under Title II]. 42 U.S.C.A. § 2000a(e). The L.A.D. exempts only those "bona fide clubs" which are "in their nature distinctly private". Organizations which hold themselves out as servicing a public

For example, an independent barber shop located in the basement of a hotel, that does not solicit guests of the hotel as clients but is listed on signs in the hotel elevator showing the various services located in the hotel, is a place of public accommodation even though a barbershop is not ordinarily covered under Title II. *Pinkney v. Malloy*, 241 F. Supp. 943 (N.D. Fla. 1965).<sup>\*</sup> This conclusion satisfies the goals of Title II "to remove discrimination in places of public accommodation . . . with respect to all the services rendered and operated within the physical confines which hold themselves out as serving patrons of the [public accommodation]." 241 F. Supp. at 947.<sup>\*\*</sup>

The New Jersey L.A.D. is also concerned with the elimination of discrimination in "all the accommodations, advantages, facilities and privileges" of places of public accommodation. *N.J.S.A.* 10:5-4. To effectuate this concern, the Division must "deal with the substance, rather than the form of transactions, and not permit important legislative policies to be defeated by artifices affecting legal consequences of the existing situation." *Beach Associates*, 286 F. Supp. at 807. A careful analysis of the relationship between Princeton University and the Clubs allows the Division to

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accommodation and are in fact connected to that place of public accommodation, have undermined any claim that the organizations are *distinctly private* in their *nature*.

<sup>\*</sup> Under the N.J. L.A.D., a barber shop is a place of public accommodation. *N.J.S.A.* 10:5-5(1).

<sup>\*\*</sup> In this case, the listing on the signs by the elevator appear to be the only indication of the barber shop holding itself out as serving the hotel patrons. In another case based on § 2000(b)(4)(A)(iii), a beach club was said to be holding itself out as serving patrons of a carry-out food shop "by supplying the tables at which most of such patrons consume the food purchased at the shop, which provides no such facilities for those customers." *United States v. Beach Associates, Inc.*, 286 F. Supp. 801 (D. Maryland 1968). In *United States v. Medical Society*, 298 F. Supp. 145 (D.S.C. 1969) a snack bar/cafeteria and a hospital were determined to be held out as serving the same patrons based on signs in the hospital indicating the location of the snackbar/cafeteria and a booklet distributed by the hospital which noted the snackbar/cafeteria as an eating facility.



look beyond the separate legal entities and in doing so the Division finds that the University and the Clubs are in reality integrally connected.

Respondent clubs are held out as part of a club system which services Princeton University students. Publications paid for by sophomore class dues and compiled by a committee of sophomore students as well as other University publications present the clubs as a dining alternative for upperclass students. Unlike eating as an "independent", having an eating club contract allows for an integration with the University dining facilities through the general meal exchange program.\*

Respondent clubs solicit Princeton University students. According to their constitutions only Princeton University students can be "active" or "undergraduate" members.\*\* To familiarize Princeton University students with the Clubs, the Clubs hold open house events, participate in the Upperclass Choice Committee meal exchange program and advertise in the University newspaper. These activities are geared exclusively toward the solicitation of Princeton University students. The exclusivity of their association with Princeton University and their use of sophomore class committees and University publications for solicitation clearly evidence the fact that the Respondent clubs are held out as closely associated with and servicing the dining/social needs of Princeton University students.

Princeton University relies on the club system to feed a majority of its upperclass students. Although some alternatives exist presently, the sheer numbers of students who are fed at the clubs are evidence of the essential nature of the service provided by the clubs. Presently, Princeton has a

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\* Characterizing certain students as "independents" is informative. The terminology itself shows that the clubs are held out as more closely associated with Princeton University than, for example, commercial eating establishments in the town of Princeton.

\*\* Tiger Inn and Cottage Club both specify "Princeton" University. Although the Ivy constitution never mentions "Princeton", Ivy has never suggested that non-Princeton students would be able to bicker at Ivy [Transcript 4/13/84 at 143].



combined seating capacity in its dining halls of approximately 1375. According to the "preferable" and "manageable" ratios suggested in a University memorandum, this seating capacity could feed between 2290 and 2750 students. Clearly major changes would be required in University dining arrangements if an additional 1570 students holding club contracts were added to the 2645 presently holding University contracts.\*

Princeton University's reliance on the clubs is not merely evidenced through a statistical analysis but is also clear from the University's continual review of the status of the clubs and University involvement in efforts to keep the club system viable. As recently as the early 1970's when the survival of the club system was in question, Princeton University proposed and jointly funded a study of the clubs. The University then took specific actions in response to that study to assist the clubs.

The relationship between Princeton University and the clubs is no doubt closer than the University would have with a completely autonomous provider of food services such as a commercial eating establishment in the town of Princeton. The picture becomes clear by looking at the various meal exchange programs, the increased loans to students for club contracts, the Interclub Agreement\*\*, the episodes of discipline of club officers for the conduct of club members, and the interest and involvement of the University Faculty and

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\* Respondents claim that if only students from the three Respondent clubs were added to the University dining facilities, the students could be easily absorbed. Respondents suggest the Division look only at this impact on Princeton University dining facilities. However, as Haskin and Sells noted, closing just three clubs could erode the entire system as well as create other financial burdens on the University. Moreover, any decision regarding jurisdiction will have implications for other clubs in the club system, not just that of Respondent Clubs.

\*\* The actual existence of an executed Interclub Agreement is unresolved. However, resolution of that issue is unnecessary for our conclusion. Unsigned copies were available in the Dean's office and excerpts of the agreement were published in the University *Rules, Rights and Responsibilities* booklet. Clearly, therefore, it is held out to the students of Princeton University that the clubs and Princeton University have this cooperative disciplinary arrangement.

Board of Trustees in the club system. The clubs connections with one another also suggest a less than casual relationship with Princeton University. The major link between the clubs are the close association with the University. Out of these connections numerous organizations grew such as the C.B.A. and the U.I.C.C. and the G.I.C.C. These organizations facilitate cooperation between the clubs as well as facilitate relations between the clubs and the University.

By looking to substance rather than form, one can see that the relationship between the clubs and Princeton University is one of integral connection and mutual benefit. The fact that Respondent Clubs are structured as independent legal entities can not obfuscate the depth of their true association with Princeton University. Based on this association, the Division rejects the contention that the clubs are distinctly private and therefore exempt from the L.A.D.

Respondents assert that if the L.A.D. is interpreted as reaching the Clubs, the members' constitutional rights of privacy and freedom of association would be violated. The Clubs claim an affirmative right to discriminate based on their members associational preference. After careful consideration, the Division finds that applying the L.A.D. to Respondent Clubs would not violate any constitutional rights of association.

The conflict between associational rights and anti-discrimination legislation was recently examined by the Supreme Court in *Roberts v. United States Jaycees*, \_\_\_\_ U.S. \_\_\_\_, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). In *Roberts*, the Court established a framework for analyzing all freedom of association claims. Initially, the Court distinguished two types of associational rights—intimate associations and expressive associations.

Our decisions have referred to constitutionally protected "freedom of association" in two distinct senses. In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such rela-

tionships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties. 104 *S.Ct.* at 3249.

Since Respondents have not suggested any protection as an expressive association, this discussion will focus on the associational freedoms protecting intimate associations.\*

The prototypes of these intimate relationships “are those that attend the creation and sustenance of a family — marriage (citation omitted), childbirth (citation omitted), and cohabitation with ones relatives (citation omitted).” 104 *S.Ct.* at 2350. The relationships are characterized by “deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of

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\* Even if Respondents did claim protection as an expressive association, the Division would consider such a claim to be without merit. Respondents have produced no evidence to suggest that the purpose of association is to “engag[e] in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.” 104 *S.Ct.* at 3249. In *Roberts*, “the Court of Appeals noted, a ‘not insubstantial part’ of the Jaycees’ activities constitutes protected expression on political, economic, cultural, and social affairs.” 104 *S.Ct.* at 3254. The Court weighed the impact on the content of the expressive communication against the compelling state interest and concluded that the Jaycees were not protected from the state anti-discrimination statute. “We are persuaded that [the state’s] compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members associational freedoms.” 104 *S.Ct.* at 3253. The Respondent Clubs, presenting no evidence of protected expressive activity, would clearly not be entitled to any constitutional protection as an expressive association.

thoughts, experiences, and beliefs but also distinctively personal aspects of life." 104 S.Ct. at 2350.

The rights of intimate association however, do not end with the family. They extend in greater and lesser degrees to other relationships which share certain attributes with family relations. These attributes include "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship". 104 S.Ct. at 2350. Determining the degree of protection "entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments". 104 S.Ct. at 3251. Determining if a particular association is protected from a particular state intrusion also requires a weighing of the state interest involved.

The size of Respondents Clubs are far larger than the "approximately 430 members" and "400 members" in the two Jaycees chapters in *Roberts* which the court found to be "large". *Id.* The Clubs each have a combined graduate and undergraduate membership in the thousands. Clearly, then, the Clubs would be considered quite large.

The degree of selectivity involved in Respondent Clubs is no doubt greater than that exercised by the Jaycees. In *Roberts*, "a local officer testified that he could recall no instance in which an applicant had been denied membership on any basis other than age or sex". *Id.* The Respondent Clubs, on the other hand, may reject on a basis other than sex anywhere from 1/4 to almost 2/3 of the applicants. Respondent Clubs did, however, compromise a degree of their members' associational preferences by participation in the hat bid system.\* The Clubs, thus, appear to fall somewhere between the total lack of selectivity evidenced by the

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\* The hat bid was in effect when Ms. Frank attempted to bicker at Respondent Clubs. If she had been a man, she might have become a member of one of the Clubs through the roll of a dice. The only selective criterion, therefore, which necessarily prevented Ms. Frank from joining Ivy, Cottage Club or Tiger Inn was her sex.

Jaycees and the highly selective associations such as marriage.\*

Finally a crucial consideration is the degree of seclusion from others in critical aspects of the relationship. Similar to the Jaycees, "numerous non-members of both genders regularly participate in a substantial portion of activities central to the decision of many members to associate with one another." *Id.* With the Respondent Clubs, these include the Club's primary functions of meals and social activities. The associational preferences of the members are constantly diluted through the general meal exchange program, parties advertised generally to Princeton University students or available to them through passes, open houses and renting out the club for non-member use.

Therefore, despite their greater degree of selectivity, on the "spectrum from the most intimate to the most attenuated of personal attachments" *Id.*, the Clubs appear entitled a degree of protection more closely to that afforded to the Jaycees than that afforded to family relationships. This degree of protection must then be viewed in light of the compelling state interest involved in the eradication of discrimination against women.\*\*

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\* *Cf. Village of Belle Terre v. Boras*, 416 U.S. 1 (1974); *Firefighters Institute for Racial Equality v. City of St. Louis*, 549 F.2d 506 (8th Cir.), cert. den. 434 U.S. 819 (1977). In *Belle Terre*, six students challenged a zoning ordinance which prevented them from sharing a residence. The Court specifically rejected their free association claims and upheld the ordinance although three years later the Court struck down a zoning ordinance which prohibited cohabitation of extended family members. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). In *Firefighters*, informal selective eating arrangements or "supper clubs" organized by on duty firefighters resulted in segregated eating arrangements. Although free association issues were not specifically raised, the Court not only permitted intrusion into the associations but ordered the Fire Department to act to prevent the continued operation of segregated clubs. 549 F.2d at 515. Both the students of *Belle Terre* and the "supper clubs" in *Firefighters* appear smaller and more selective than Respondent Clubs.

\*\* In *Roberts*, the Jaycees were so lacking in characteristics of intimate associations that the Court did not look to the state interest until reaching the



"By prohibiting gender discrimination in places of public accommodation, the [state anti-discrimination] Act protects the State's citizenry from a number of serious social and personal harms." 104 *S.Ct.* at 3253. This goal was clearly important to the New Jersey legislature when, in passing the L.A.D., the legislature declared that "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundations of a free democratic state *N.J.S.A.* 10:5-3. As a University, Princeton has an obligation to provide all of the advantages, privileges and facilities of the University to all students on a non-discriminatory basis. Based on Respondent Clubs relationship to the University those same obligations are applicable to the advantages, privileges and facilities of the clubs.

The eating clubs are a significant dining and social option offered to Princeton University upperclass students. However, instead of offering this option on a non-discriminatory basis, the complaint alleges that a dual system of eating options exists based on sex. Men have the full range of options available while women's options are more circumscribed. In enforcing the anti-discrimination legislation, the State has a compelling interest in "removing the barriers to economic advancement and political and social integration that have plagued certain disadvantaged groups, including women." *Roberts*, 104 *S.Ct.* at 3254. This interest is implicated by the alleged activities of Princeton University and Respondent Clubs. In balancing this compelling state interest against the degree of protection from intrusion the Clubs are entitled to, the Division finds that free association rights would not be violated by the assertion of jurisdiction over these "private clubs" that are integrally connected with Princeton University.

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speech-related associational protections. Nevertheless, the Court characterized the State interest in eradicating discrimination against women as compelling. 104 *S.Ct.* at 2353.



## II. DISCRIMINATION

The investigation reveals the following undisputed facts which are relevant to the issue of discrimination:

1. During spring 1979 bicker, Sally Frank was permitted to bicker at the Ivy Club. However, she was told by Ivy's president that she could only speak to Ivy members when there were no sophomore men waiting to speak to Ivy members.
2. During spring bicker of 1980, Tiger Inn, Cottage and Ivy refused to permit Sally Frank to bicker.
3. From time to time the undergraduate members of Tiger Inn and University Cottage Club have held informal votes on whether to admit females into the club. In each case the overwhelming majority voted against permitting women to become members.
4. The issue of admitting women to Ivy Club has never been put to a formal vote of the undergraduate members but it is the general consensus of the club that women should not be extended membership.
5. As per the clubs' directions, women bickerees received interview appointments only at the coed selective clubs while men could receive appointments at all selective clubs.
6. A woman was not eligible for a hat bid when hat bids were in existence.
7. From their inception until 1984, all members of Ivy, Cottage and Tiger Inn have been males.
8. Princeton University provides publicity for Respondent Clubs in University publications.
9. Princeton University participates in meal exchange programs with Respondent Clubs.
10. Sophomore Class dues, collected by Princeton University, are used to publish articles publicizing the

clubs as well as to fund a meal exchange program in which women cannot dine at Respondent Clubs.

11. Princeton University considers the cost of club meal contracts when calculating a financial aid package for students.
12. After a jointly funded study of the club system, Princeton University took specific actions relating to the clubs, including providing centrex phone extensions and snow removal, operating a University purchasing program and passing a Board of Trustee Resolution in support of the club system.

Based upon the foregoing facts, I conclude that probable cause exists to believe that the Respondents, Trustees of Princeton University\*, Ivy Club, University Cottage Club and Tiger Inn, have violated *N.J.S.A.* 10:5-4, 10:5-12(f) and 10:5-12(e) by discriminating against women in places of public accommodation and by aiding and abetting such discrimination.

5/4/85

Date

/s/ PAMELA S. POFF

Pamela S. Poff,

• Division of Civil Rights.

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\* In Answer to the Verified Complaint, Respondent, denoted in such complaint as "Princeton University," requested that the complaint reflect the correct name, the Trustees of Princeton University.

**Order of the Superior Court of New Jersey  
Appellate Division Dated September 6, 1983**

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION**

**Docket No. A-2378-81T3  
Motion No. M-5033-82  
Before Part C**

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**SALLY FRANK,**

**—vs.—**

**IVY CLUB, TIGER INN, THE UNIVERSITY COTTAGE CLUB,  
PRINCETON UNIVERSITY, NEW JERSEY DIVISION  
ON CIVIL RIGHTS**

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**ORDER ON MOTIONS/PETITIONS**

**Moving Papers Filed: August 11, 1983**

**Answering Papers Filed:**

**Date Submitted to Court: August 24, 1983**

**Date Argued:**

**Date Decided: September 6, 1983**

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**ORDER**

**This matter having been duly presented to the Court, it is  
hereby ordered as follows:**

**Petition for Rehearing: Denied**

FOR THE COURT:

/s/ JOHN W. FRITZ

John W. Fritz, P.J.A.D.

Witness, the Honorable John W. Fritz, Presiding Judge of  
Part C, Superior Court of New Jersey, Appellate Division,  
this 6th day of September, 1983.

/s/ ELIZABETH MCLAUGHLIN

Clerk of the Appellate Division

**Order of the Superior Court of New Jersey  
Appellate Division Dated August 1, 1983**

**SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION**

**A-2378-81T3**

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**SALLY FRANK,**

*Complainant-Appellant,*

**—vs.—**

**IVY CLUB, TIGER INN, THE UNIVERSITY COTTAGE CLUB,  
PRINCETON UNIVERSITY, NEW JERSEY DIVISION  
ON CIVIL RIGHTS,**

*Respondents-Respondents.*

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**Argued May 3, 1983—Decided August 1, 1983**

**Before Judges Fritz, Joelson and Petrella.**

**On appeal from New Jersey Department of Law and Public Safety, Division on Civil Rights.**

**[APPEARANCES OMITTED]**

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**PER CURIAM**

This appeal is from a determination in the Division on Civil Rights (Division) in a matter in which complainant, Sally Frank, appellant here, charged the three respondent "eating clubs" (clubs) at Princeton University as well as Princeton University itself with discrimination against her on account of her sex, an activity made unlawful by our Law Against Discrimination, *N.J.S.A. 10:5-1 et seq.* We reverse and remand.

The basic factual predicate for the complaints is simple, easy to state and undisputed. Frank was wholly denied an opportunity to compete for membership at two of the clubs (Cottage and Tiger) and substantially denied that opportunity at the other (Ivy) and she was refused membership in these all-male clubs on the basis of her sex. In addition to a claim of mootness—Frank has graduated and no longer is at Princeton—the clubs argue that they are “bona fide private clubs,” not public accommodations within *N.J.S.A. 10:5-1 et seq.* and not “a ‘part of’ Princeton University for purposes of conferring jurisdiction on the Division of [sic] Civil Rights.” They insist that whatever are plaintiff’s rights, they have rights under the First and Fourteenth Amendments to the United States Constitution and under Article I of the New Jersey Constitution which will be denied by any success in this attempt to abridge their right to freedom of association. Princeton also insists that it is not a place of public accommodation “with respect to the eating and social activities of its students.” They also argue mootness and assert, as a factual matter, that the respondent clubs are not a part of Princeton University.

These positions, argued here, persuaded the Division, after an alleged investigation, to dismiss the complaints. This is Frank’s appeal from the order of dismissal. That order, without any findings of fact, recited the conclusion of the Acting Director of the Division that:

1.) The University Cottage Club, Ivy Club and Tiger Inn are bona fide clubs by their nature distinctly private and as such these Respondent clubs are excluded from the jurisdiction of the Division On Civil Rights pursuant to *N.J.S.A. 10:5-5(1)*.

2.) There is not probable cause to credit the allegations of the Complaint filed against Princeton University.

We dispose first of the claim of mootness. Frank argues that the matter is not moot inasmuch as she has demanded damages. She also urges upon us the fact that membership in



the clubs carries benefits which extend beyond undergraduate years and that it is within the power of the Division to redress the injury with a present remedy. We need not address these arguments. We are satisfied that the matter is of substantial public importance and should be resolved in the public interest. In such case we may decide the issue even though the litigation be thought to be moot, a conclusion which, as we said, we need not here determine. *Busik v. Levine*, 63 N.J. 351, 364 (1973), app. dism. 414 U.S. 1106 (1973); see *De Rose v. Byrne*, 139 N.J. Super. 132, 134 (App. Div. 1976).

At the outset it is important that we make perfectly clear the fact that, although we have determined to reverse and remand, we are not here deciding the substantive issues. We are deciding only the question of whether the Acting Director should have determined the important jurisdiction issue in a summary manner and if so, whether the absence of findings is justified and acceptable. We are persuaded that both questions should be answered in the negative. As we observed with respect to the claim of mootness, the matter is vitally important. This is so in the context of the apparently expanding civil rights perimeters. It is also so with regard for the need for Princeton University, the status of which as a place of public accommodation has already been explored in *Peper v. Princeton University Board of Trustees*, 77 N.J. 55 (1978), to know the ground rules in connection with its closely affiliated adjuncts and with university services provided or made available to students.

Turning first to the most easily answered of the two inquiries, we find no justification whatsoever for the absence of factual findings. An unsigned document, entitled a "FINAL CASE DISPOSITION REPORT," demonstrating approval of the disposition recommended therein on a date which followed the entry of the order appealed from by almost two weeks, hardly serves as an adequate substitute. Even were we to accord some respect to the document (to which, in our judgment, it is not entitled), the briefly recited "findings" are themselves a wholly inadequate foundation upon which to posit the important determination here made.

The necessity for precise fact finding in administrative agencies has long been clear. *Smith v. E.T.L. Enterprises*, 155 N.J.Super. 343, 347-349 (App.Div. 1978); *Van Realty, Inc. v. City of Passaic*, 117 N.J.Super. 425, 428-429 (App. Div. 1971). In *Drake v. Human Services Dept.*, 186 N.J. Super. 532 (App.Div. 1982) we pointed out agency action could only be tested for rationality by an examination of "why and under what authority the agency acted, and knowing that, to examine the record as a whole for substantial credible evidence supporting the conduct." (At 536.) As we pointed out there, the absence of findings frustrates such a review. There, after discussion respecting the adequacy of the record, we said:

However, even the best record will be unavailing unless we can also discern the use to which it was put by the factfinder. That is why we have been so insistent over the years respecting the need for factfinding and the bounden duty of the factfinder simply but fully and clearly to tell us why. *State in the Interest of J.M.*, 57 N.J. 442, 445 (1971); *State v. Singletary*, 165 N.J. Super. 421, 424-425 (App.Div.1979), certif. den. 81 N.J. 50 (1979); *Kenwood Associates v. Englewood Bd. of Adj.*, 141 N.J.Super. 1, 4 (App.Div.1976); *Reiser v. Simon*, 63 N.J.Super. 297, 300-301 (App.Div.1960). The obligation is no lighter in an administrative agency. *Smith v. E.T.L. Enterprises*, 155 N.J.Super. 343, 347-349 (App.Div.1978); *Van Realty, Inc. v. Passaic*, 117 N.J.Super. 425, 428-429 (App.Div.1971). [At 538.]

In the matter before us the absence of findings alone would warrant, if not mandate, a remand.

The procedure in the agency was not so apparently wrong as is the absence of findings, but in the unusual and important circumstances of this case was, we think, inappropriate. It is obvious from the statement of items comprising the record on appeal (see *R. 2:5-4(b)*) that the agency received much documentation in connection with this matter, including sub-

stantial correspondence to which complainant was a party.<sup>1</sup> But we believe in a case like this more is required than a preliminary investigation toward the end of announcing whether there is or is not jurisdiction.

Obviously, if the Division lacks jurisdiction it may not entertain and therefore not adjudicate a complaint of unlawful discrimination, and this even in cases where all parties desire an adjudication on the merits. *Peper v. Princeton University Board of Trustee, supra*. It is probably for this reason that the administrative regulations governing procedure in the Division, *N.J.A.C. 13:4-1.1 et seq.*, which deal with matters respecting which the Division has jurisdiction, detail no procedure for a determination as to whether jurisdiction does reside in the Division. Nevertheless, a denial of jurisdiction is as significant to a complainant as would be the ultimate determination regarding discrimination. Clearly, a complainant's rights must not be procedurally abridged.

Over the years the matters of when a hearing must be held and the nature of such a hearing have resulted in a great deal of legal scrimmaging. Much of what has been said has been synthesized in the veritable catechism on the subject found in *Cunningham v. Dept. of Civil Service*, 69 N.J. 13 (1975). It teaches that where, as here, the rights of a specific person are affected by the proposed action of the agency there is a right to a hearing. We see no reason why the same rule should not apply when the potential is for agency inaction affecting the rights, duties, powers or privileges of the party.

So much of the record as we have seen holds many questions. Disciplinary regulations which once bound the clubs closely to the University no longer exist, we are told, although no formal abrogation appears. The furnishing of meals and food by way of the exchanging of gratuities, if no

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<sup>1</sup> For some unexplained reason a good deal of this did not find its way into any appendix and was not otherwise brought to the attention of the court. Inasmuch as we are satisfied that, all things considered, the agency should have tested its jurisdiction by way of a plenary hearing, we are not as concerned by this obvious dereliction (see *R. 2:6-1(a)(7)*) as we might otherwise have been.

way else, suggests a nexus which may well constitute a challenge to the claim of the clubs to an individual private status. In this respect even the investigation of the Division arouses suspicion where it reports and speculates, "Division investigation disclosed that the University is planning to contract with certain eating clubs to provide dining facilities for its students (the 'CURL' plan). *While one of the possible contract plans appeared to be questionable under the Law Against Discrimination, it appears that a non-discriminatory model will be implemented.*" [Emphasis supplied.]

We are persuaded that if a record sufficient to supply "descriptions of the accompanying colorations, the circumstances and the other pertinent factors" is necessary to measure the propriety of the denial of tenure to a teacher on the claim of the teacher that she was not retained because of her remarks in public, *Winston v. Bd. of Ed. of So. Plainfield*, 64 N.J. 582, 587 (1974), then complainant here is entitled to a more formal inquiry as to the factual issues insofar as they relate to jurisdiction of the Division over her complaint. If an assistant dog warden, provisionally appointed and subject to dismissal without cause, is entitled to an evidentiary hearing because of deprivation of "liberty" interests, *Williams v. Civil Service Commission*, 66 N.J. 152 (1974), what logic would deny such a hearing to complainant here? Measured by the entire breadth of *Cunningham v. Dept. of Civil Service*, *supra*, the agency procedure here was inadequate. Here we are satisfied, as was the Supreme Court there, that under the circumstances present, complainant is "entitled to a hearing as a matter of fundamental fairness and administrative due process." (69 N.J. at 26.)

We pause to repeat for emphasis that we intimate no view on the merits. Further, we have not dealt with either probable cause or a substantive determination respecting discrimination *vel non*. We have addressed only the issue of the determination in the Division relating to jurisdiction.<sup>2</sup> Need-

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2 Obviously so much of the impugned order as determines no probable cause respecting Princeton University depends on the jurisdictional issue involving the clubs, at least in part. To that extent we go beyond a "pure" jurisdictional issue.

less to say, should the fair hearing we now order result in a determination of jurisdiction the agency may, within its discretion, also determine the existence or not of probable cause and even the substantive issues, providing, of course, that the record is sufficient and any determination is accompanied by adequate findings of fact and conclusions of law.

The order is vacated, the complaints are reinstated and the matter is remanded to the Division for further proceedings consistent with the foregoing. We do not retain jurisdiction.

Order of the New Jersey Division on Civil Rights  
Dated December 9, 1981

STATE OF NEW JERSEY  
DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION OF CIVIL RIGHTS

Docket No. PL05-01678, 01679, 01680

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SALLY FRANK,

*Complainant,*

—vs—

THE UNIVERSITY COTTAGE CLUB, IVY CLUB, TIGER INN,  
PRINCETON UNIVERSITY,

*Respondents.*

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FINAL ORDER OF DISMISSAL

WHEREAS, the named Complainant filed Verified Complaints with the Division On Civil Rights on December 19, 1979; and

WHEREAS, the Division On Civil Rights has investigated the allegations of the aforementioned Complaint; and

WHEREAS, it is the conclusion of the Director of the Division On Civil Rights that:

1.) The University Cottage Club, Ivy Club and Tiger Inn are bona fide clubs by their nature distinctly private and as such these Respondent clubs are excluded from the jurisdiction of the Division On Civil Rights pursuant to N.J.S.A. 10:5-5(1).

2.) There is not probable cause to credit the allegations of the Complaint filed against Princeton University.



NOW THEREFORE, it is on this 9th day of December 1981 ordered that:

The Verified Complaints filed against Princeton University, the University Cottage Club, Ivy Club, and Tiger Inn be dismissed with prejudice.

/s/ PAMELA S. POFF

Pamela S. Poff, Acting Director  
Division on Civil Rights

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

TIGER INN,

*Petitioner,*

—v.—

SALLY FRANK,

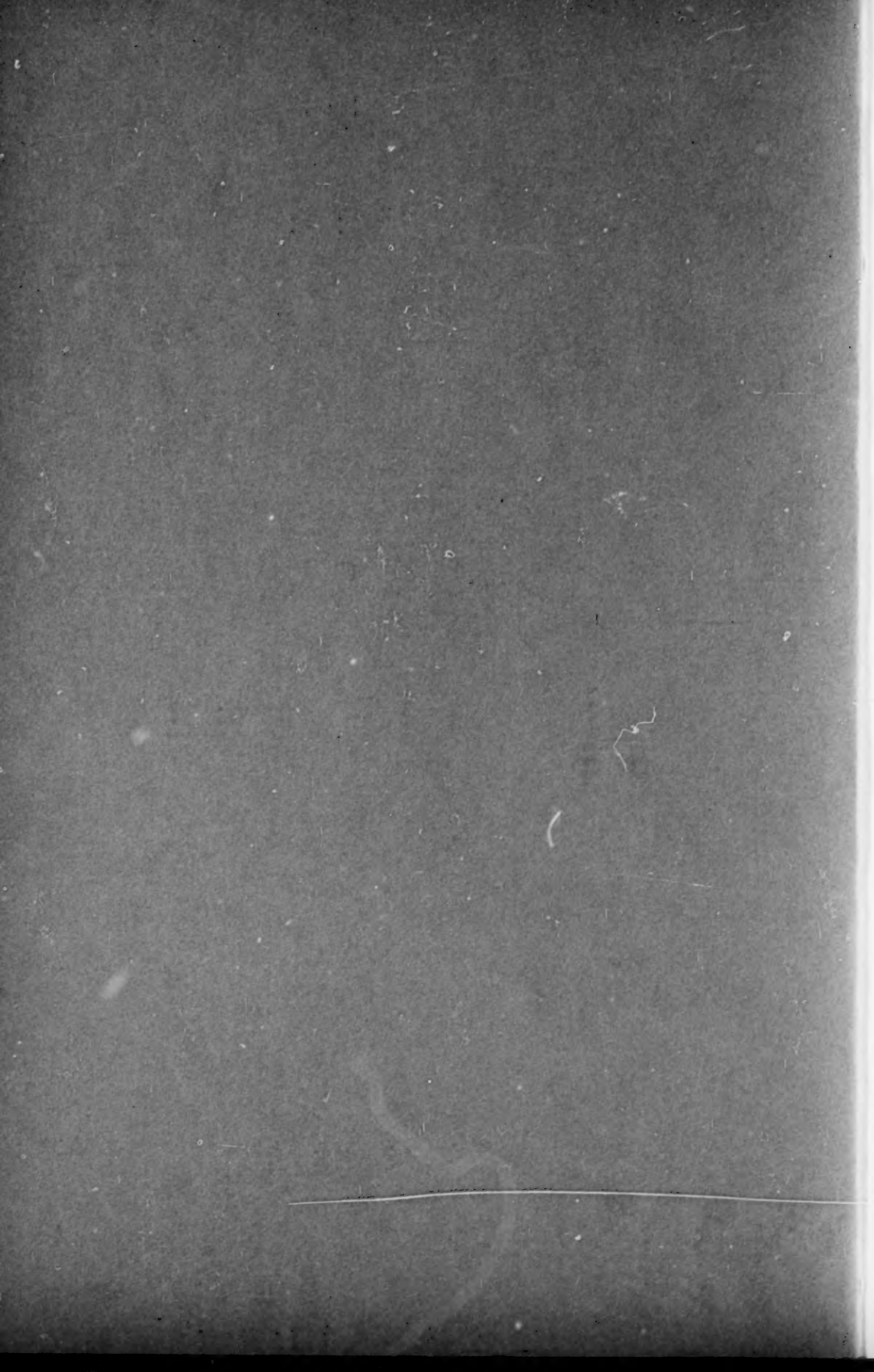
*Respondent.*

**BRIEF IN OPPOSITION TO ISSUANCE OF  
THE WRIT OF CERTIORARI**

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(on behalf of the AMERICAN  
CIVIL LIBERTIES UNION  
OF NEW JERSEY)



**QUESTION PRESENTED**

May New Jersey constitutionally apply its Law Against Discrimination to an 1800 member eating club that has an integral relationship of mutual benefit with Princeton University, a public accommodation?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, the Tiger Inn, The Ivy Club, The University Cottage Club, the Trustees of Princeton University, Sally Frank, and the New Jersey Division of Civil Rights. The University Cottage Club settled the case with Ms. Frank and did not participate in the proceedings before the New Jersey Supreme Court. All other parties listed above participated in the New Jersey Supreme Court hearings.

Respondent, Sally Frank, is an individual and therefore has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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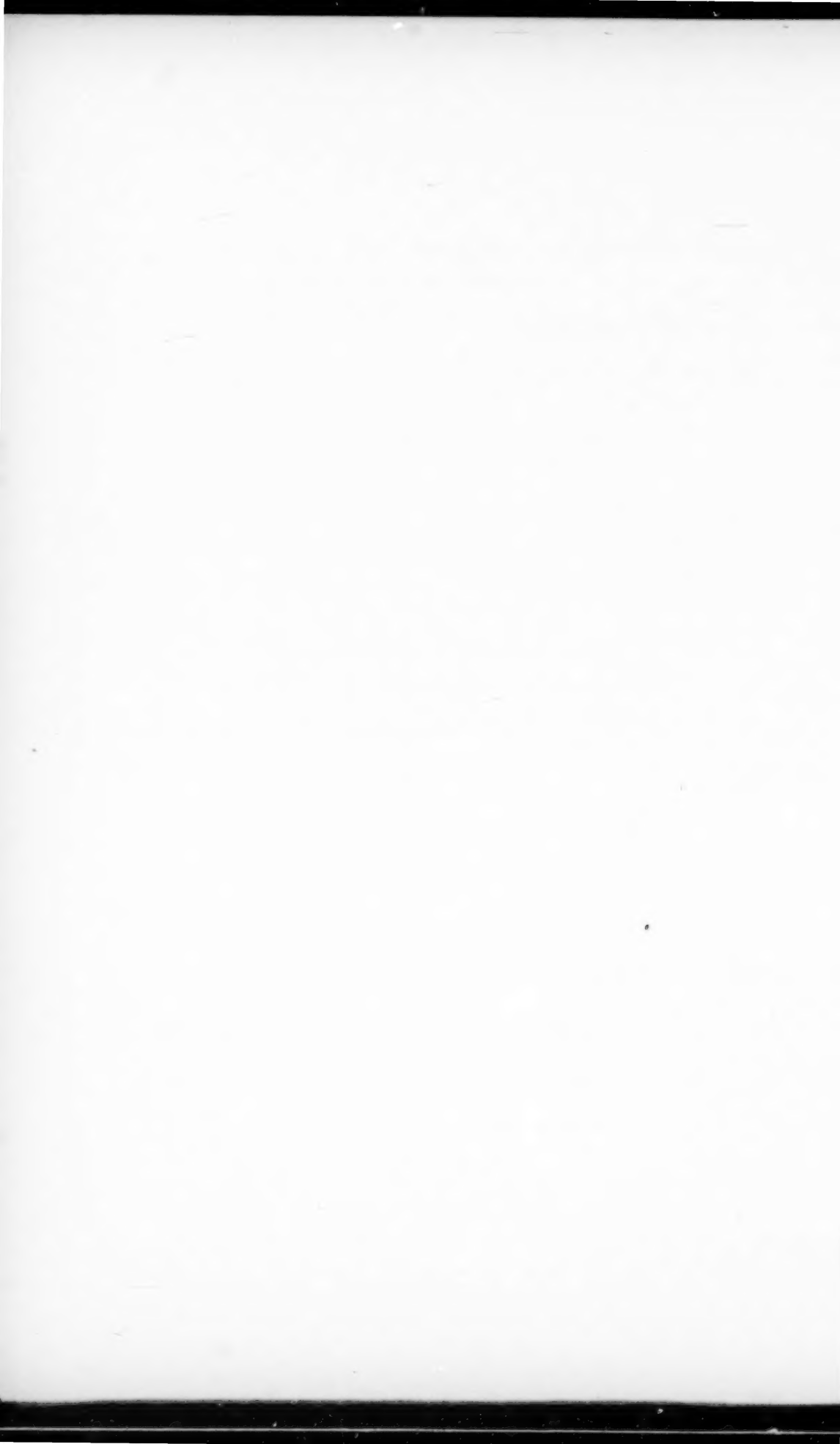
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No. 90-575

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1990

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TIGER INN,  
Petitioner

v.

SALLY FRANK,  
Respondent

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BRIEF IN OPPOSITION TO ISSUANCE OF THE  
WRIT OF CERTIORARI

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STATEMENT OF THE FACTS

Princeton University ("Princeton" or "the University") is a nonsectarian, residential institution of higher education founded in 1746 and located in Princeton, New Jersey. (Stip. #1 & 2, Ja 3157).<sup>1</sup> It was an all-male university until 1969

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1. "Stip" refers to the parties' stipulations as to undistiputed facts entered in the record. "Ja \_\_\_\_" refers to the Joint Appendix submitted to the New Jersey Appellate Division, which contained, inter alia, the stipulations.



(Stip. #24, Ja 3159), when it admitted women as undergraduates. (Stip. #3, Ja 3157).

In 1856, the University's dining hall burnt down. It was not replaced for many years. Students were then faced with finding alternative arrangements, which could not be fraternities because fraternities had been banned at approximately the same time. (Ja 1396, 1397, 1449). In 1879, a group of students joined together to form the Ivy Club ("Ivy") as a permanent eating and social facility for Princeton students. (Stip. #9, Ja 3157). The University Cottage Club ("Cottage") was the second to form in 1886 (Stip. #10, Ja 3157) and the Petitioner, Tiger Inn ("Tiger"), was third, forming in 1890. (Stip. #11, Ja 3158). Princeton took care that these organizations were not fraternities. Indeed, the clubs were seen as an "antidote to fraternities." (Ja 2076).

By 1979, when Ms. Frank instituted this action, Princeton had thirteen eating clubs. Five of the clubs were selective, choosing their new members through an interview process known as "bicker." Three of those clubs, the subjects of Ms. Frank's complaints, were all-male as well as selective. (Stip. #1, Ja 3160). The other eight were coed and nonselective, choosing their new members through a lottery system. (Stip. #28, Ja 3160).

The sophomore class at Princeton prepares, prints and pays for an annual booklet that discusses student eating options for the junior and senior years. The clubs assist the sophomore class in compiling the pamphlet, which, in 1984, was called Princeton's Guide to Academic and Social Life.

(Stip. #27, Ja 3160). This pamphlet serves to begin the selection process for all of the clubs. Each year students are organized for the selection process at the selective clubs, known as "bicker," by a committee chaired by a sophomore.<sup>2</sup> (Stip. #64, Ja 3164). The clubs work together to coordinate their selection procedures, with the nonselective clubs coordinating their sign-in procedures and the selective clubs coordinating bicker. (Stip. #64 & #75, Ja 3164). Spring bicker is held at the same time for all of the clubs, and registration for spring bicker is held at one place. (Stip. #72 & #73, Ja 3165).

Tiger is a large club consisting of over 1800 members. (Cert. Pet., p.3) This year, approximately 125 of those members were undergraduates. (Cert. Pet., p.3) According to Tiger's constitution, new undergraduate members are chosen by the undergraduate members "from the Senior, Junior, and Sophomore classes of Princeton University only, in accordance with the rules established by the University authorities." (Tiger Constitution, Ja 563). The other classifications for membership are graduate, associate, and honorary members (Stip. #189, Ja 3177). Upon graduation or leaving Princeton, undergraduate members automatically become graduate members. (Ja 563). In 1972, there were only six honorary members and fifteen associate members. (Ja 5597)

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2. In 1979, the degree of support for bicker from the University administration has varied. See Frank v. Ivy Club, 120 N.J. 73, 84-85 (1990). When Ms. Frank first bickered, students registered for bicker by completing one form, available in the Dean of Students Office, and depositing the form in that office. (Stip. #31, Ja 3152).

While Tiger requires a unanimous vote by a given year's undergraduate members to accept new undergraduate members (Stip. #90, Ja 3167), most applicants are, in fact, offered membership. In 1984, for example, 81.25 percent of the applicants for undergraduate membership in Tiger Inn received offers of membership, "bids." (Stip. #96, Ja 3167). All non-undergraduate members are elected to club membership by a three-fourth vote of the appropriate segment of the club. (Ja 563) Through 1983, Tiger participated in the "hat bid" system, a system under which the selective clubs guaranteed that any man who sought membership in all of the selective clubs and who kept every bicker appointment, but who did not receive an offer to join any club, would be guaranteed membership in one of the selective clubs. (Stip. #24, Ja 3151; Stip. #99, Ja 3168) In 1980, the club assignment for a hat bid was determined by a roll of the dice. (Ja 4831)

Tiger delegates the selection of new members to a small portion of its membership. Tiger advertises its fall bicker in the school paper. (Ja 1478, 1481, 1484). Club minutes repeatedly reflect Tiger's concern for obtaining a membership size that will help pay its bills. (Ja 5613, 5647). If bicker is successful, the undergraduate class size (number of admittees) is large. (Ja 5613, 5647)

The eating clubs constitute the primary dining option for upperclass students at Princeton. During the 1983-84 school year, 1570 out of 2230 juniors and seniors (more than 70%) had meal contracts with one of the thirteen eating clubs.

(Stip. #50, Ja 3163) Princeton's dining halls, as currently constituted, do not have the capacity to feed these 1570 extra students during meal hours. In fact, the University plans on the majority of its upperclass students eating in eating clubs. (Stip. #29, Ja 3152) Thus, as the New Jersey Division on Civil Rights found in a conclusion upheld by the New Jersey Supreme Court, Princeton relies on the eating clubs to feed a majority of its upperclass students. See Frank, supra, 120 N.J. at 91. Tiger is part of that system. It provides daily meal service to its members while school is in session. Nonmembers, including women, also eat regularly at the club. (Ja 3019-21, 3030)

The eating clubs, which hold parties regularly, also serve as centers for upperclass student social life. At times, these parties are advertised as open generally to the entire Princeton University community or to all sophomores. (Ja 1480, 2813, 2819). At other times, although passes are nominally required for admission to a party, the passes are available on request. (Ja 2821). Moreover, women are frequently admitted to parties at Tiger without having been given a pass. (Ja 1717-1719). Wives of graduate members frequent the club. (Ja 5692). Non-members also visit Tiger when it is rented for weddings or other affairs. (Ja 5602, 5614, 5626, 5664, 5672, 5674). The clubs do not, however, serve a major residential function for the University. In fact, very few members live at Tiger, or any of the other clubs. Thus, Tiger characterizes itself as a "social and dining facility," not a dormitory. (Ja 5028).

Throughout the clubs' history, Princeton has subjected

them to substantial regulation. Princeton has disciplined club members for activity in the clubs and at times has even disciplined officers for the activities of members of the club, holding the officers vicariously liable.<sup>3</sup> This regulation is accepted by Tiger Inn in its house rules, which state, inter alia:

6. No member of the freshman class nor first term sophomores shall be admitted to the Clubhouse, unless so authorized by University authorities ....

11. Undergraduate members are not allowed to consume alcoholic beverages in the clubhouse unless special permission has been secured by the Undergraduate President from the office of the Dean and the Board of Governors of the Club. (Ja 565)

Tiger's relationship with the University has remained close through the almost twelve years this lawsuit has been pending. Although Tiger recently claimed to sever a few of its superficial ties with Princeton, as recently as the fall of 1989, a section of a university class met regularly at Tiger Inn. (Aff. of Jennifer Weiner in Support of Motion of Princeton Undergraduates for Coeducated Eating Clubs to File an Amicus Brief in the New Jersey Supreme Court at para. 5). Moreover, Tiger continues to maintain a close relationship with the other clubs.

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3. On one of those occasions, those disciplined were officers of a club that was once a party to these proceedings. (Stip. #22, Ja 3151)

In short, the uncontested facts, as stipulated to by the parties and as explicitly found by the New Jersey Supreme Court, show that Tiger and Princeton "have an integral relationship of mutual benefit." Frank, supra, 120 N.J. at 110. The conclusion of Tiger Inn's own official history underscores Tiger's close relationship with Princeton:

Through all these first fifty years one thing, above all others, had remained typical of Tiger Inn -- the loyalty of undergraduates and alumni alike. No one who had kept in close touch with the Club could doubt this loyalty. And all Tiger Inn men could be proud of the fact that affection for the Club had been secondary to a love of Princeton without which loyalty to Tiger Inn would be meaningless. (Ja 543).

#### PROCEDURAL HISTORY

Respondent, Sally Frank, enrolled in Princeton as a first-year student in September, 1976. She was graduated with an A.B. degree in 1980. (Stip. #103, Ja 3168) During her sophomore, junior, and senior years, Ms. Frank attempted to join each of Princeton's all-male eating clubs. After being denied membership in Ivy and denied the opportunity even to bicker at Tiger and Cottage during her junior year because of her sex (Stip. #'s 106 & 107, Ja 3168), Ms. Frank filed discrimination complaints against Princeton and each of the three all-male clubs in February, 1979.

The New Jersey Division on Civil Rights ("Division")



initially refused to process these complaints. When Ms. Frank was once again denied membership and the opportunity to bicker during her senior year, she refiled the complaints. This time, the Division issued the verified complaints in December, 1979. In December, 1981, after a cursory investigation, the Division dismissed the complaints, and Ms. Frank appealed. The New Jersey Appellate Division reversed and remanded the case for further investigation and fact finding in August, 1983.

The Division then conducted a thorough investigation of her complaints, holding two day-long fact finding conferences at which it heard testimony from a witness for each party and accepted over 200 stipulations agreed upon by the parties. It also accepted thousands of pages of documents from each party. Following the investigation, on May 14, 1985, the Director of the Division ("Director") issued a Finding of Probable Cause and found that the Division had jurisdiction over the complaints.

The case was then transferred to the New Jersey Office of Administrative Law ("OAL") for hearings. The Director granted Ms. Frank's motions for partial summary decision on jurisdiction and on liability based on the uncontested facts in the stipulations and documents in the record. Ms. Frank settled her claims against Cottage after it agreed to admit women in February, 1986. In July, 1986, Ms. Frank settled almost all of her claims against Princeton, which, however, remained a party to the case. A formal six-day hearing on remedy took place in the OAL in July and August, 1986.

Following the hearing, the Administrative Law Judge ("ALJ") recommended to the Director that Ivy and Tiger be ordered to sever their ties with Princeton rather than requiring them to admit women; that Ms. Frank be paid damages for the harassment she suffered as a student challenging the clubs' discriminatory practices; and that she not be awarded membership in the clubs. Ms. Frank and Princeton filed exceptions to these recommendations with the Director. In May 1987, the Director ordered Tiger and Ivy to admit women as members and doubled the damages they were required to pay to Ms. Frank, but declined to order them to offer membership to Ms. Frank.

Tiger and Ivy appealed the order of the Director. In October, 1988, the New Jersey Appellate Division reversed and remanded on the procedural ground that summary decision was improper and that a hearing should have been held on all issues. Ms. Frank then sought state Supreme Court review of the decision. Finding that there were no material facts in dispute requiring hearings on jurisdiction or liability and that the Director's remedial order was appropriate, the New Jersey Supreme Court reversed the Appellate Division and reinstated the Director's order on July 3, 1990. The instant Petition for certiorari followed.<sup>4</sup>

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4. Ivy Club chose not to request certiorari. Instead, it pursued a 42 U.S.C. Section 1983 suit against the state and Ms. Frank, claiming its rights are being violated. When the federal District Court Judge refused to enjoin the state from enforcing the New Jersey Supreme Court ruling, Ivy admitted women.

## REASONS FOR DENYING THE WRIT

### I. THE NEW JERSEY SUPREME COURT DECISION APPLYING ITS STATE LAW AGAINST DISCRIMINATION TO REMEDY TIGER INN'S CLEAR SEX DISCRIMINATION CONFORMED TO THE SETTLED LAW OF THIS COURT.

In asking for review of the New Jersey Supreme Court's decision that blatant sex discrimination by Princeton University eating clubs violates the state's Law Against Discrimination, Tiger Inn points neither to any novel question of law nor to any conflict between the circuits. Nor could it. Instead, it attempts to invoke clear principles of law set forth in three recent cases, all upholding state anti-discrimination laws against challenges based on freedom of association and all issued without dissent by this Court since 1984. Moreover, in its attempt to come within the purview of Roberts v. U.S. Jaycees, 468 U.S. 609 (1984); Bd. of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987); and New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988), Tiger ignores both the facts and the reasoning of these decisions.

Disregarding these clear and consistent holdings, Tiger's Petition for Certiorari would have this Court accord to the club First Amendment protection as an intimate association for its consistent practice of discriminating against women.<sup>5</sup> Tiger is, however, unable to show it is the type of intimate association the Constitution was designed to protect.

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5. Tiger makes no pretense of a claim to expressive association.

Tiger Inn neither furthers the purpose this Court has identified for protecting intimate associations, nor does it satisfy the criteria that this Court repeatedly set forth for identifying such associations. As the cases make clear, the purpose of protecting intimate associations is to ensure that individuals are able to enter into and maintain the special sort of ties that are essential to emotional enrichment and definition of one's identity. Jaycees, supra, at 619; Rotary Club, supra, at 544. Though the Court has not marked the precise boundaries of the type of private or intimate association it accords constitutional protection, it has pointed repeatedly to family-like relationships as the prototype intimate association. Jaycees, supra, at 619-620; Rotary Club, supra, at 545.<sup>6</sup> Thus this Court has "emphasized the First Amendment protected those relationships, including family relationships that presuppose 'deep attachments and commitments to the necessarily few individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life.'" Rotary Club, supra, at 545, quoting Jaycees, supra, at 619-620.

The Court has set forth a list of those factors to assist in identifying those special relationships meriting constitutional protection. Such intimate associations "are

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6. For example, Justice Powell pointed out in Rotary Club that the "the intimate relationships to which we have accorded constitutional protection include marriage, Zablocki v. Redhail, 434 U.S. 374 (1978); the begetting and bearing of children, Carey v. Population Services Int'l, 431 U.S. 678 (1977); childrearing and education, Pierce v. Society of Sisters, 268 U.S. 510 (1925); and cohabitation with relatives, Moore v. East Cleveland, 431 U.S. 494 (1977) (parallel citations omitted).supra, 481 U.S. at 545.

distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship," Jaycees, supra, at 620. Further, even if an organization is sufficiently small, selective, seclusive and otherwise private as to merit protection as an intimate association, it still may be subjected to state legislation if necessary to serve a compelling state interest. Moreover, New Jersey's public accommodations law, like those before the Court in Jaycees, Rotary Club, and New York State Club Ass'n, "plainly serv(e) compelling state interests of the highest order." Jaycees, supra, at 624, quoted in Rotary Club, supra, at 549.

A. Tiger Fails to Meet the Criteria for Protection Clearly Set Forth by this Court.

In its 1984 Jaycees opinion, explicitly reaffirmed in Rotary and New York State Club Ass'n, this Court clearly outlined the criteria for invoking the right of intimate association. Like the clubs involved in those cases, Tiger Inn fails to show it is the sort of small, selective and secluded organization that merits constitutional protection.

Size. As it itself concedes, Tiger has over 1800 members. Thus Tiger's membership is almost ten times the size this Court considered too large for constitutional protection in Rotary Club, supra, 481 U.S. at 546, and far bigger than the 400 or so member chapters that the Court found too big in Jaycees, supra, 468 U.S. at 621. Similarly, the New York City law upheld in New York State Club Ass'n,

supra, 108 S. Ct. at 2233, regulated New York City clubs with 400 or more members.

Indeed, given Tiger's size, it is highly unlikely that all of Tiger's 1800 members have even met one another, much less developed close personal relationships, particularly in cases where there may be as much as 70 years between their admissions. Tiger Inn attempts to avoid the clear holdings of these three cases by seeking to distinguish active undergraduate and inactive graduate members. There is, of course, no basis for disregarding Tiger's approximately 1675 alumni members. Moreover, in asserting that the undergraduate body -- whose membership changes annually -- amounts to an intimate association, Tiger simply ignores the fact that its 125-man membership is more than six times that found not to merit constitutional protection in Rotary Club, supra, 482 U.S. at 546.

Selectivity. There are at least three reasons why the process by which Tiger's members are chosen does not demonstrate the necessary selectivity for constitutional protection. First, most applicants are admitted to Tiger. For example, in 1984, 81.25 percent of the applicants were offered membership. Tiger's concern to maintain a certain undergraduate membership size to break even for its meal service may well explain this lack of selectivity. Second, Tiger delegates membership selection to a small and changing segment of the club. Under this delegation, the vast majority of Tiger's members never meet, let alone choose to form personal ties with the new members. Third, Tiger's participation in the "hat-bid" system until 1983, by which it



agreed to accept any person assigned to the club literally by a roll of the dice, demonstrates a willingness to share membership with any Princeton male. In sum, Tiger admissions have little to do with the sort of intimate associations and personal relationships the Constitution shields from government interference.

Seclusivity. The third specific criterion set forth by this Court, seclusivity, refers to the degree to which association activities are limited to group members. Critical to the Court's decisions in the Jaycees, Rotary Club and New York State Club Ass'n cases was the important role that strangers play in all three types of clubs. Thus the Court pointed to the fact that, "rather than carrying on their activities in an atmosphere of privacy, [the clubs] seek to keep their windows and doors open to the whole world," Rotary Club, supra, at 547. Indeed, it is the presence of strangers that distinguishes the public from the private, for, as this Court said in New York Club Ass'n, "[i]t may well be that a considerable amount of private or intimate association occurs in [a club] setting, as is also true in many restaurants and other places of public accommodation, but that fact alone does not afford the entity as a whole any constitutional immunity to practice discrimination when the Government has barred it from doing so." supra, 108 S. Ct. at 2233-2234.

The provision of dining and social life are the essence of Tiger Inn's functions. As a result of undergraduates continuously bringing guests to meals, alumni returning with their families, parties being advertised as open to the whole community or through invitations available to anyone seeking

them, nonmembers are a central part of these critical functions. Further, the club is rented out to members or their relatives for non-club functions which are obviously attended by numerous nonmembers. Moreover, Tiger claims no interest in excluding women. Indeed, the members of Tiger affirmatively choose to associate with women when participating in club functions. The nonmembers who visit the club are frequently women. Women may be present at every meal and at all parties. Tiger merely wishes to keep those women in an inferior, nonmember status. The desired and consistent presence of strangers means that Tiger cannot claim constitutional protection for such preferences.

In short, Tiger Inn is not a small, selective, and secluded association requiring First Amendment protection. There is no question that members of Tiger do not share the sort of intimacy which, if not protected, would deny any fundamental liberty to its members. For Tiger simply cannot meet the criteria clearly set forth by this Court in its three recent cases, and it has shown no reason for their reevaluation.

**B. The Only Unique Consideration Operative in this Case Is the Symbiotic Relationship Between Tiger Inn and Princeton University, Which Is a Special Factor Further Undercutting Tiger's Claim of Intimate Association.**

As the Jaycees decision made clear, in addition to the three criteria analyzed above, special factors may be pertinent in particular cases. Jaycees, *supra*, 468 U.S. at 620.

Both the New Jersey Supreme Court and the Division on Civil Rights specifically found, on the basis of undisputed facts, that Tiger and Princeton "have an integral relationship of mutual benefit." Frank, supra, 120 N.J. at 92, 110. The Division and Court findings were based on substantial evidence and turned on their close understanding of the role of the club system at Princeton University. Reviewing the facts carefully, the Division gave little weight to Tiger's present financial and legal independence from the University. Frank, supra, 120 N.J. at 103. Far more relevant to both bodies were the facts that Tiger holds itself out as part of a club system which serves Princeton students; that Tiger draws its membership almost exclusively from Princeton students; and that Princeton relies on the club system to feed a majority of the upperclass students. Id. Thus, in the New Jersey Supreme Court's words, "[t]he finding of an integral and symbiotic relationship is based on the undisputed factual conclusions that the Clubs [Tiger and Ivy] need the University and the University needs the Clubs, rather than on any particular act of control or integration." Frank, supra, 120 N.J. at 104.

Having sought unsuccessfully to divert attention from the real workings of the club system and Tiger's role in it in the New Jersey agency and court, Tiger seeks once again to focus attention on "the assiduously maintained legal separateness of the club." Frank, supra, 120 N.J. at 103. In doing so, however, it would have this Court simply ignore these clear findings and retry the matter de novo.

Tiger's attempt to dispose of the findings below underscores the significance of the special considerations at play in this case. Princeton is unquestionably a public accommodation. Peper v. Princeton University Board of Trustees, 77 N.J. 55, 67 (1978). As the New Jersey Supreme Court stated, "[w]here a place of public accommodation and an organization that deems itself private share a symbiotic relationship, particularly where the allegedly 'private' entity supplies an essential service which is not provided by the public accommodation, the servicing entity loses its private character." Frank, supra, 120 N.J. at 104, citing Hebard v. Basking Ridge Volunteer Fire Co., 104 N.J. Super. 77 (App. Div. 1978), cert. denied, 81 N.J. 294 (1979); Franklin v. Order of United Commercial Travellers, 590 F. Supp. 225 (D. Mass. 1984); Adams v. Miami Police Benevolent Ass'n, 454 F.2d 1315 (5th Cir. 1972) cert. denied, 409 U.S. 843 (1972).

Given the reality of the integral connection between Tiger and the University, providing shelter to Tiger's discriminatory practice has little to do with fostering the type of close personal ties that underlie the protection accorded intimate associations. As the unique relationship between Tiger and Princeton makes crystal clear, neither First nor Fourteenth Amendment rights are in jeopardy here.

C. Even If Tiger Inn Did Have a Right to Intimate Association, the State's Compelling Interest in Ending Discrimination Allows It To Limit that Right

Although Tiger Inn clearly has no claim of intimate

association, even if it did, that right would not be absolute. As the Jaycees, Rotary Club and New York State Club Ass'n cases make plain, the government may abridge or interfere with that First Amendment associational right when the government is pursuing a compelling state interest that cannot be achieved by means less restrictive of the freedom of association. Jaycees, supra, 468 U.S. at 623; Rotary Club, supra, 481 U.S. at 549; New York State Club Ass'n, supra, 108 S. Ct. at 2233-2234. Moreover, this Court has made crystal clear that the interest in preventing discrimination based on sex, the very claim in the case at bar, meets the compelling interest test. For New Jersey, in particular, "the eradication of the 'cancer of discrimination' has long been one of [the] state's highest priorities." Dixon v. Rutgers, The State University, 110 N.J. 432, 451 (1988), quoting from Fuchilla v. Layman, 109 N.J. 319, 334 (1988), cert. denied, 109 S. Ct. 75 (1988).<sup>7</sup>

The State surely has a compelling interest in freeing its citizens from the penalties of sex discrimination. Discrimination based on sex "is peculiarly repugnant in a society which prides itself on judging each individual by his or her merits." Peper v. Princeton University Board of Trustees, supra, 77 N.J. at 80 (1978). Moreover, it is clear that the order herein uses the least restrictive means to accomplish

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7. N.J.S.A. 10:5-3 states that "The Legislature finds and declares that practices of discrimination against any of its inhabitants because of ... sex ... are a matter of concern to the government of the State and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundations of a democratic State.

that compelling interest, for Tiger is still able to choose which women to admit. No individual woman, not even Ms. Frank, is forced on Tiger by the order. Thus, even assuming Tiger could legitimately assert a claim to protection as an intimate association, any such claim is outweighed by the State's need to eradicate discrimination and the narrowly tailored means its highest court approved for doing so.

## II. CONTRARY TO THE ARGUMENTS OF PETITIONER AND AMICUS, THIS CASE DOES NOT INVOLVE FRATERNITIES.

Petitioner and amicus have urged this Court to grant certiorari on the assertion that the single sex status of all fraternities in the country have been placed in jeopardy by the decision below, despite the fact that there is no evidence or basis for believing that fraternities throughout the nation are even threatened by the ruling now before the Court.

In many states there would be no question that fraternities would not be subject to attack under their public accommodations laws. Ten states lack public accommodations laws and six of the states and the federal government that prohibit discrimination in public accommodations do not bar sex discrimination. See Discrimination on Campus: A Critical Examination of Single-Sex College Social Organizations, 75 Cal. L. Rev. 2117, 2125 (1987). The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., is one of the broadest anti-discrimination laws



in the country. Its exemption for only "distinctly private" clubs is narrower than other private club exemptions. Thus fraternities are not vulnerable nationally.

There is not even evidence that fraternities in New Jersey would be found to be barred from discriminating. Princeton's eating clubs have a unique history and status at Princeton. If a fraternity case came before it, the New Jersey Supreme Court might well limit its ruling to the facts of the instant case and find that fraternities are distinctly private clubs.

Petitioner and amicus also fail to show that if fraternities as single sex institutions are as valued as the petitioner and amicus imply, New Jersey's legislators will not act to shield their discriminatory practices in the same way that the federal government has shielded them from its law barring sex discrimination in educational institutions receiving federal funds. 20 U.S.C. Sec. 1681(a). Thus, the New Jersey legislature as a representative body, like any legislature, is perfectly capable of exempting from its anti-discrimination laws groups that it finds valuable.

Moreover, Tiger's argument ignores the fact that Tiger Inn is not a fraternity. Princeton in fact banned fraternities in 1856 and expelled students for having joined fraternities. The eating clubs were seen as an "antidote to fraternities", and Princeton has not recognized any fraternity on campus since. Thus, the argument appears to be that this Court should grant certiorari because, even if Tiger is not a fraternity and could constitutionally be required to admit women, some

fraternities on some other campuses might deserve constitutional protection and might be attacked in the future. In other words, they suggest that the ruling in this single case would apply to fraternities throughout the country.

This Court rejected such an overbreadth argument in New York State Club Association, 487 U.S. supra at 14. In that case, the Court endorsed the decision in Broadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973), that said "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." The New Jersey Supreme Court decision carefully analyzed the facts surrounding Tiger Inn to determine if the state anti-discrimination law should apply. It also upheld the Division's analysis of Tiger which helped it determine that Tiger had no claim to freedom of intimate association. There is, however, no evidence in the record on the workings of any specific fraternity to help this Court determine whether a fraternity could be constitutionally required to admit women. Therefore, this Court should not grant certiorari on this case based on the speculation that fraternities could be affected.

Indeed, the record and facts clearly show that Tiger is not a fraternity. Unlike fraternities on most college campuses, Tiger does not have a large percentage of its student members living in its building. Thus, unlike most fraternities, Tiger does not function as a dormitory. If Tiger were primarily a dormitory, it might have been exempt from the New Jersey Law Against Discrimination, which exempts single sex housing from its reach. N.J.S.A. 10:5-12(g).

Essential to the New Jersey Supreme Court conclusion that Tiger is a public accommodation was its finding that Tiger and the other clubs would not exist were it not for Princeton University:

It would be disingenuous for the Clubs to assert that they could ever exist apart from Princeton University. The Clubs gather their membership from Princeton and, in turn, provide the service of feeding Princeton students. Frank, supra, 120 N.J. at 104.

Such a finding could not be made about most fraternities and sororities. Generally national organizations, fraternities and sororities exist at numerous universities but do not gather their membership from any one university.<sup>8</sup> Thus, most such organizations could easily exist apart from any one university.

Given these and other significant differences between fraternities and Tiger Inn, this case is not an appropriate vehicle to determine whether fraternities and sororities should have a right to discriminate. Each case will have widely varying facts, and those facts will shape the outcome of those cases. While a Court might correctly find that one particular fraternity has a right to discriminate based on the facts involving that fraternity, the same Court might correctly find another fraternity must stop discriminating. This Court

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8. For a discussion of the benefits to national affiliation that most fraternities have, see Fraternities and Sororities on the Contemporary College Campus, Winston, Nettles, & Oppen, Jr., editors, Jossey Bass, Inc., 1987, pages 30-31.

should allow the states leeway in applying their individual laws to different factual situations. In short, there is no reason for this Court to step in at this time.

### CONCLUSION

For the foregoing reasons, respondent, Sally Frank, respectfully requests that this Court not issue the Writ of Certiorari.

Respectfully submitted,

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(5)

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In The  
Supreme Court of the United States

October Term, 1990

TIGER INN,

*Petitioner,*

vs.

SALLY FRANK,

*Respondent.*

Petition For A Writ Of Certiorari To The  
Supreme Court Of New Jersey

BRIEF IN OPPOSITION  
TO PETITION FOR A WRIT OF CERTIORARI  
ON BEHALF OF RESPONDENT  
NEW JERSEY DIVISION ON CIVIL RIGHTS

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### QUESTION PRESENTED

Does the First Amendment to the United States Constitution preclude the State of New Jersey from enforcing its anti-discrimination statute against an eating club which has been found, based on a voluminous record of evidence, to be a place of public accommodation which is integrally connected to Princeton University?

### LIST OF PARTIES

Petitioner Tiger Inn omitted the New Jersey Division on Civil Rights ("Division") from the List of Parties set forth in its Petition for a Writ of *Certiorari*. The Division participated as a party respondent in the proceedings before the Supreme Court of New Jersey as well as in the Superior Court of New Jersey, Appellate Division, and is therefore properly a party to the instant matter under Supreme Court Rule 19.6.

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No. 90-575

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In The  
**Supreme Court of the United States**  
October Term, 1990

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TIGER INN,

*Petitioner,*

vs.

SALLY FRANK,

*Respondent.*

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**Petition For A Writ Of Certiorari To The  
Supreme Court Of New Jersey**

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**BRIEF IN OPPOSITION  
TO PETITION FOR A WRIT OF CERTIORARI  
ON BEHALF OF RESPONDENT  
NEW JERSEY DIVISION ON CIVIL RIGHTS**

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**COUNTERSTATEMENT OF THE CASE**

This matter began in December 1979, when respondent Sally Frank filed a verified complaint with the Division against, among other parties, Tiger Inn ("Tiger"), the Ivy Club, and the University Cottage Club ("Clubs"), alleging discrimination based on sex in a place of public accommodation in violation of the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-12(f). After a brief investigation, the Division determined that it

lacked jurisdiction over the Clubs and was therefore unable to adjudicate this matter. Ms. Frank successfully appealed this decision to the Appellate Division of the Superior Court of New Jersey, which remanded the case to the Division for further investigation and fact-finding. *Frank v. Ivy Club*, 120 N.J. 73, 80, 576 A.2d 241, 244 (1990) (Pal to Pa36).\*

On remand, the Division proceeded to conduct an extensive investigation in which the parties presented and cross-examined witnesses, submitted documents and reached agreement on over 200 stipulations. *Id.*, 120 N.J. at 81-82, 576 A.2d at 245. Along with these factual submissions, Tiger (and the other Clubs), extensively briefed the issue of whether the Clubs were protected from the reach of the LAD because of First Amendment associational rights.

On May 14, 1985, the Division issued a finding of probable cause which included a finding of jurisdiction (Pa180). In concluding that the Division had jurisdiction over the Clubs, the Division addressed at length the freedom of association claims raised by the Clubs in light of this Court's decision in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), holding that the Clubs' " . . . free association rights would not be violated by the assertion of jurisdiction over these 'private clubs' that are integrally connected with Princeton University" (Pa218).

After an adversarial administrative hearing on remedies, on May 26, 1987, the Division issued its final

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\*"Pa" refers to the Appendix to the Petition for a Writ of *Certiorari* filed by Tiger Inn.



order in this matter, which directed Tiger and the other Clubs to admit women (reversing a recommendation by an administrative law judge that allowed the Clubs to sever ties with Princeton in lieu of complying with the LAD); awarded damages and attorney's fees to Ms. Frank; and reaffirmed the earlier Division ruling on the Clubs' associational rights claim (Pa68).

Tiger appealed this decision to the Appellate Division of the Superior Court of New Jersey, which remanded the case for additional proceedings because certain facts allegedly remained in dispute. *Frank v. Ivy Club*, 228 N.J. Super. 40, 548 A.2d 1142 (N.J. App. Div. 1988) (Pa38).

After granting certification, on July 3, 1990, the Supreme Court of New Jersey issued its decision, which reversed the Appellate Division and reinstated the May 26, 1987 Division order. *Frank v. Ivy Club, supra*, 120 N.J. at 111, 576 A.2d at 261. While not discussing the First Amendment issue at length, the Court noted that the Division "rejected the argument that the Club members' constitutional free-associational rights would be violated" if the Clubs were subject to the LAD. *Id.*, 120 N.J. at 92, 576 A.2d 251. Moreover, the Clubs' claim that they are "distinctly private" and thus exempt from the anti-discrimination law – an issue inextricably intertwined with the constitutional privacy claim – was extensively discussed and rejected by the New Jersey Supreme Court. 120 N.J. at 102-104, 110-112, 576 A.2d at 256-257, 260-261.

The factual history of this matter is fully described in the decision of the Supreme Court of New Jersey, *Frank v. Ivy Club, supra*. A brief synopsis of relevant facts set forth

below underscores why, as found by the Division and the State Supreme Court, Tiger is not the type of highly personal and intimate association protected from the reach of state anti-discrimination laws by the First Amendment.

After extensive agency proceedings, which produced a record consisting of over 5,000 pages of evidence,\* the following material facts were undisputed (*see, Id.*, 120 N.J. at 83-90, 576 A.2d at 246-250):

1. The Clubs, including Tiger, provide dining facilities for a majority of upperclass students of Princeton University ("Princeton"). The University in fact has space in its dining halls to accommodate only a small percentage of its upperclass students.
2. The Clubs, including Tiger, advertise "bicker" (the membership selection process), open-house events and parties in the *Daily Princetonian*, the campus newspaper. Non-members of Tiger, including women, attend such parties and open houses.
3. The Clubs, including Tiger, are rented out occasionally for non-Club functions attended by non-members, including women.
4. Princeton informs upperclass students about dining options, including the Clubs, through various University publications.

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\*In its Appendix, Tiger Inn has placed before the Court only the decisions below. In the event this Court grants the Writ of *Certiorari*, Tiger should be required to file with the Court the entire appendix which was submitted to the Supreme Court of New Jersey, which contains all of the evidence presented to the Division on Civil Rights.

5. Tiger participates in Princeton's general meal exchange program whereby non-member student guests of Tiger members, including women, are allowed to eat at Tiger at no additional cost if the non-member students are part of the University's dining system. Tiger also participates in the Upperclass Choice Meal Exchange, whereby non-member sophomores who are not guests can dine at Tiger, with cost of the meal reimbursed by Princeton.
6. A 1967 report of Princeton's Subcommittee of the Faculty Committee on Undergraduate Life concluded that "the University and the Clubs are now mutually dependent on each other. The Clubs depend on the University for an annual supply of undergraduates that virtually insures the continuance of the system; and the University depends on the Clubs for dining and recreational facilities."
7. Acting on the results of a study seeking improved integration of the Clubs and Princeton, beginning in 1975, Princeton began to help in the collection of overdue Club accounts; adopted a resolution "reaffirming the University's view that the Club system provides an important social option for undergraduates;" arranged for presentation of the Clubs in freshman orientation; and described the Club system in a student handbook.
8. Princeton University provides financial aid to its students to cover the cost of belonging to an eating club. [Pa193]
9. At the time that Tiger Inn rejected Sally Frank for membership because of her gender, the selective clubs such as Tiger participated in a system known as the "hat bid." Under this system, a male applicant for a

selective club such as Tiger who was not otherwise offered club membership through the Bicker process, was given the opportunity to join a selective club through a random assignment process. [Pa185]

Based on such facts the Division concluded that Princeton relies on the Club system to feed a majority of upperclass students; that the Club system is associated with Princeton and is characterized by all parties as serving Princeton students; and that non-member students participate in many Club activities and utilize Club facilities. *Id.*, 120 N.J. at 91-92, 576 A.2d at 250-251 (Pa14 to Pa15).

In its decision, the Supreme Court of New Jersey specifically affirmed both these underlying facts and the ultimate conclusion reached by the Division concerning the existence of "an integral and symbiotic relationship" between the Clubs, including Tiger, and Princeton. *Id.*, 120 N.J. at 104, 576 A.2d at 257. The Court placed particular emphasis on the facts that the discriminatory eating clubs (including Tiger Inn) are held out as part of a club system which serves Princeton students; that the Clubs draw their membership almost exclusively from Princeton University students; and that Princeton relies on the club system to feed a majority of its upperclass students. 120 N.J. at 103, 576 A.2d at 256. Based on the undisputed facts, the Court found the University and the Clubs to be functionally interdependent and to have "an integral relationship of mutual benefit." 120 N.J. at 110, 576 A.2d at 260. The Court also held that while the parties did not agree on a variety of proposed stipulations, there were no material facts in dispute. *Id.*, 120 N.J. at 105-110, 576 A.2d at 257-260.

The Court concluded that:

Where a place of public accommodation and an organization that deems itself private share a symbiotic relationship, particularly where the allegedly 'private' entity supplies an essential service which is not provided by the public accommodation, the servicing entity loses its private character and becomes subject to laws against discrimination [citations omitted]. It would be disingenuous for the Clubs to assert that they could ever exist apart from Princeton University. The Clubs gather their membership from Princeton and, in turn, provide the service of feeding Princeton students. Because of this, the Clubs lack the distinctly private nature that would exempt them from LAD. [120 N.J. at 104, 576 A.2d at 257]

Reaffirming the State's compelling interest in eradicating gender discrimination and the particularly critical importance of eliminating discrimination in educational institutions, the Court affirmed the Division's ruling that Tiger Inn must cease discriminating against women students. 120 N.J. at 110-111, 576 A.2d at 260.

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### SUMMARY OF ARGUMENT

The writ should be denied because the decision below was entirely consistent with the decisions of this Court concerning the power of states to apply their anti-discrimination laws to organizations claiming to be private clubs. *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987); *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988). Tiger Inn was found by the

Supreme Court of New Jersey to be a place of public accommodation because of its integral connection to Princeton University. This Court should defer to the factual findings of the Division and the Supreme Court of New Jersey concerning the interrelationship between the Clubs and Princeton, and should not permit Tiger Inn to relitigate those facts here. *Time, Inc. v. Firestone*, 424 U.S. 448, 463 (1976). Moreover, apart from its relationship to Princeton, Tiger Inn does not meet the standard for a private club, as articulated in *Roberts*, *Rotary* and *New York Club Ass'n*, primarily because it is not a small, intimate or family-like group, having over 1700 members and because non-members including women regularly participate in the core activities of the club. As a place of public accommodation, Tiger Inn has no First Amendment right to invidiously discriminate against women. See, *Bell v. Maryland*, 378 U.S. 226 (1964).

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## ARGUMENT

**THE WRIT SHOULD BE DENIED BECAUSE THE DECISION OF THE SUPREME COURT OF NEW JERSEY IS FULLY CONSISTENT WITH THE DECISIONS OF THIS COURT CONCERNING THE APPLICATION OF STATE ANTI-DISCRIMINATION LAWS TO ALLEGEDLY PRIVATE CLUBS.**

Since 1984, this Court has issued three decisions involving the interplay between state anti-discrimination laws and First Amendment associational rights, *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Board of Directors of Rotary International v. Rotary Club*, 481 U.S. 537 (1987) and *New York State Club Association v. New York City*, 487



U.S. 1 (1988). In these three cases, this Court has recognized a First Amendment right to freedom of intimate association which shields from State intrusion certain family-type relationships. *Roberts v. United States Jaycees*, *supra*, 481 U.S. at 619-620; *Board of Directors of Rotary International v. Rotary Club*, *supra*, 481 U.S. at 545. However, such First Amendment protections are not absolute, and must be balanced with "the compelling state interest" in the eradication of discrimination against women. *Roberts*, *supra*, 481 U.S. at 620; *Rotary Club*, *supra*, 481 U.S. at 549. Because factors including size, membership practices and the lack of seclusion from others in central activities demonstrated that the clubs involved in these cases were not highly intimate associations, this Court upheld the application of State anti-discrimination laws against the clubs in all three decisions.

The instant case involves a logical application of the principles set forth in *Roberts*, *Rotary Club* and *New York State Club Association* to a club which provides crucial services for a large university subject to the LAD, and which does not possess the distinctive characteristics that would bring it within the constitutional protection afforded a highly personal or intimate association. Given the New Jersey Supreme Court's correct decision, based on the unique facts of this case, and this Court's recent explication of the constitutional considerations in applying state anti-discrimination laws to club membership policies, there is simply no warrant to grant *certiorari*.\*

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\* Tiger is wrong in asserting that the decision of the Supreme Court of New Jersey will have "a far-reaching

In *Roberts and Rotary Club*, this Court held that "a careful assessment" must be made of an association's "objective characteristics" to determine whether the association involves such close and intimate familial-type relationships as to warrant constitutional protection. *Rotary Club, supra*, 481 U.S. at 545-546; *Roberts v. United States Jaycees, supra*, 468 U.S. at 620. The central "objective characteristic" of Tiger, as found by the Division and the New Jersey Supreme Court, is its "symbiotic relationship" with, and dependence on Princeton, an institution which has already been determined by the New Jersey Supreme Court to be a public accommodation subject to the LAD. *Peper v. Princeton University Board of Trustees*, 77

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(Continued from previous page)

impact," potentially affecting thousands of fraternity and sorority chapters (Tiger Petition for Writ of *Certiorari*, p. 14). New Jersey's anti-discrimination law (as well as those of many other states) does not apply to an "accommodation which is in its nature reasonably restricted exclusively to members of one sex" (for example, a "camp, bathhouse, dressing room, . . . -comfort station") or to real property which is planned for and occupied exclusively by persons of one sex. N.J.S.A. 10:5-12(f); N.J.S.A. 10:5-12(g). While an eating club such as Tiger is not "by its nature" a single-sex institution, and while its members do not live in the club house, these statutory exemptions could at least arguably be relied upon by fraternities. Moreover, a college fraternity or sorority in which members live together far more closely resembles a constitutionally protected familial association than does an eating club such as Tiger, whose central functions involve the provision of dining and social services. Indeed, despite the claim of Tiger and of *amicus* National Inter-Fraternity Conference that the 1987 decision of the Division, as affirmed by the New Jersey Supreme Court, opens the door to challenges to single-sex fraternities, neither Tiger nor *amicus* cite a single such case.

N.J. 55, 67, 389 A.2d 465 (N.J. 1978). As detailed in the decision below, Tiger depends on Princeton for providing the Club with continued membership, and Princeton depends on Tiger (and the other Clubs) for feeding students and providing them with social activities. This Court should defer to the factual findings below concerning the functional interdependence between Princeton and the eating clubs and should not permit Tiger to relitigate those factual issues here. *Time, Inc. v. Firestone*, 424 U.S. 448, 463 (1976). Because of Tiger's close connection with a large University unquestionably subject to the LAD – a relationship in which Tiger is involved in important functions of University life – Tiger cannot claim that it is the kind of highly intimate or private association shielded by the First Amendment. See, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (inter-connection between restaurant and governmental parking authority triggered application of Equal Protection Clause in race discrimination case). See also, *Adams v. Miami Police Benevolent Assoc.*, 454 F.2d 1315 (5th Cir. 1972), cert. den., 409 U.S. 843 (1972); *Franklin v. United Commercial Travelers*, 590 F. Supp. 255, 259-260 (D. Mass. 1984) (fraternal benefit society not distinctly private and exempt from state anti-discrimination law because of its close connection with municipal police department); *United States Power Squadrons v. State Human Rights Appeal Board*, 452 N.E.2d 1199, 1205, 465 N.Y.S.2d 871, 877 (N.Y.Ct. of App. 1983) (ongoing relationship of boating club to governmental entities for purpose of informing public about boating safety negated claim by club that it was entitled to First Amendment immunity from state anti-discrimination law).

Moreover, regardless of Tiger's interrelationship with Princeton, the undisputed facts in this matter demonstrate that Tiger is not the type of association warranting First Amendment protection from anti-discrimination laws. Among the attributes that distinguish relationships protected by the First Amendment are "relative smallness, a high degree of selectivity to begin and maintain the affiliation, and seclusion from others in crucial aspects of the relationship." *Roberts*, 468 U.S. at 620. See also, *Rotary Club*, *supra*, 481 U.S. at 546. Tiger meets none of these prerequisites.

First, Tiger is not a "relatively small" association, as it has over 1,700 members, including 125 undergraduate members (Tiger Petition, p. 14). Tiger is thus larger than entities which this Court found were not sufficiently intimate associations to warrant First Amendment protection. In *Roberts*, the two Jaycees chapters had 400 and 430 members, respectively. *Id.*, 468 U.S. at 621. In *Rotary Club*, the unprotected local clubs ranged in membership from fewer than 20 to more than 900. 481 U.S. 456. Further, in *New York State Club Association*, this Court found that the local law barring discrimination in clubs with more than 400 members (which provided regular meal service and received payment from non-members) could be constitutionally applied. 487 U.S. at 6, 12.

Second, Tiger's membership practices are not so selective as to warrant a finding of intimate associational rights. Although the practice has been discontinued, at the time of Tiger's rejection of Ms. Frank, male applicants for a selective club such as Tiger who were not otherwise admitted were given the opportunity to join a selective

club through a random assignment process known as a "hat bid" (Pa185).

Finally, Tiger's members are not secluded from others to a sufficient degree to warrant First Amendment protection. In *Rotary Club*, this Court held that the participation of non-members in "central" activities of an association strongly weighs against a finding that the association involves the type of intimate or highly personalized relationships shielded from state interference. *Rotary Club, supra*, 481 U.S. at 547. Moreover, in *New York State Club Association*, the fact that the challenged law was designed to cover clubs which provided regular meal service to, and received payments from, non-members was a primary basis for this Court's rejection of the First Amendment overbreadth claim, as these criteria at least facially demonstrated "the non-private nature" of associations subject to the law. *New York State Club Association, supra*, 487 U.S. at 12.

In this case, among Tiger's primary functions are the provision of meals and social activities. Tiger participates in meal exchange programs whereby non-member guests, and certain sophomore students, who are not guests, dine at Tiger. *Frank v. Ivy Club, supra*, 120 N.J. at 87-88, 576 A.2d at 248. Tiger actively solicits participation by non-members in open-house events and parties, and rents the Club for private functions attended by non-members. *Id.*, 120 N.J. at 86, 576 A.2d at 247. Significantly, Tiger allows (and indeed encourages) the participation of women in Tiger's central social functions, parties and open-houses. It is also undisputed that Tiger members routinely dine with female guests at the Club (R at 1717a to 1719a;

1480a; 2813a; 2819a; 3019a to 3021a; 3030a).<sup>\*</sup> These undisputed facts demonstrate the lack of "seclusion from others" in core activities of Tiger's members. Moreover, it is clear that seclusion from women is simply not a central characteristic of this association and that the members' First Amendment rights would not be violated if the club is required to cease discriminating against women in its membership policies.

As Tiger is not the type of intimate family-type association constitutionally shielded from the reach of the LAD, the State properly applied its LAD to preclude Tiger from discriminating against women.

Moreover, even assuming for the sake of argument that Tiger could meet the *Roberts* standard for a private club, its interest in excluding women must be weighed against the compelling State interest in the eradication of discrimination. As held by the court below:

Gender discrimination is contrary to the legislative policy of the State of New Jersey. "The eradication of the 'cancer of discrimination' has long been one of our State's highest priorities" . . . . The Legislature enacted LAD to reflect the belief that "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions of a free democratic state." N.J.S.A. 10:5-3. The elimination of discrimination in educational institutions is particularly critical. [*Frank v. Ivy Club, supra*, 120 N.J. at 110, 576 A.2d at 260, quoting *Dixon v. Rutgers*, 110 N.J. 432, 451, 541 A.2d 1046 (1988)]

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<sup>\*</sup> "R" refers to the record below.



This Court has squarely recognized this "compelling" state interest "in eradicating discrimination against its female citizens," an interest this Court found significant enough to outweigh the right to expressive association\* of the defendant clubs in *Roberts, supra*, 468 U.S. at 623, and *Rotary Club, supra*, 481 U.S. at 549. Discrimination by Tiger Inn will cause harm to female students at Princeton who, like Ms. Frank in 1979, will suffer the pain and humiliation of being excluded, solely because of their sex, from a Club which provides central functions for the University. Indeed, the harm to female students extends beyond the stigma of being prohibited from utilizing one of the University's primary dining and social facilities. Affiliation in clubs such as Tiger provides links to both graduate and undergraduate members which can enhance a member's career opportunities. The First Amendment cannot be used by a place of public accommodation as a shield for its discriminatory policies. *Roberts, supra*, 468 U.S. at 628; *Bell v. Maryland*, 378 U.S. 226 (1964). Given Tiger's integral relationship with Princeton University, it is clear that the State's interest in requiring Tiger to comply with the Law Against Discrimination outweighs Tiger's interest in continuing to invidiously exclude women students from membership.

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\* The First Amendment right to expressive association has not been raised by Tiger in this case, as Tiger does not exist for expressive associational purposes.

## CONCLUSION

For the foregoing reasons, respondent New Jersey Division on Civil Rights respectfully requests that the Petition for a Writ of *Certiorari* be denied.

Respectfully submitted,

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DATED: DECEMBER 28, 1990

FILED  
JAN 7 1991

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990

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TIGER INN,

*Petitioner,*

—v.—

SALLY FRANK,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF NEW JERSEY

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**PETITIONER'S REPLY MEMORANDUM  
IN FURTHER SUPPORT OF PETITION FOR A WRIT  
OF CERTIORARI AND APPLICATION FOR STAY**

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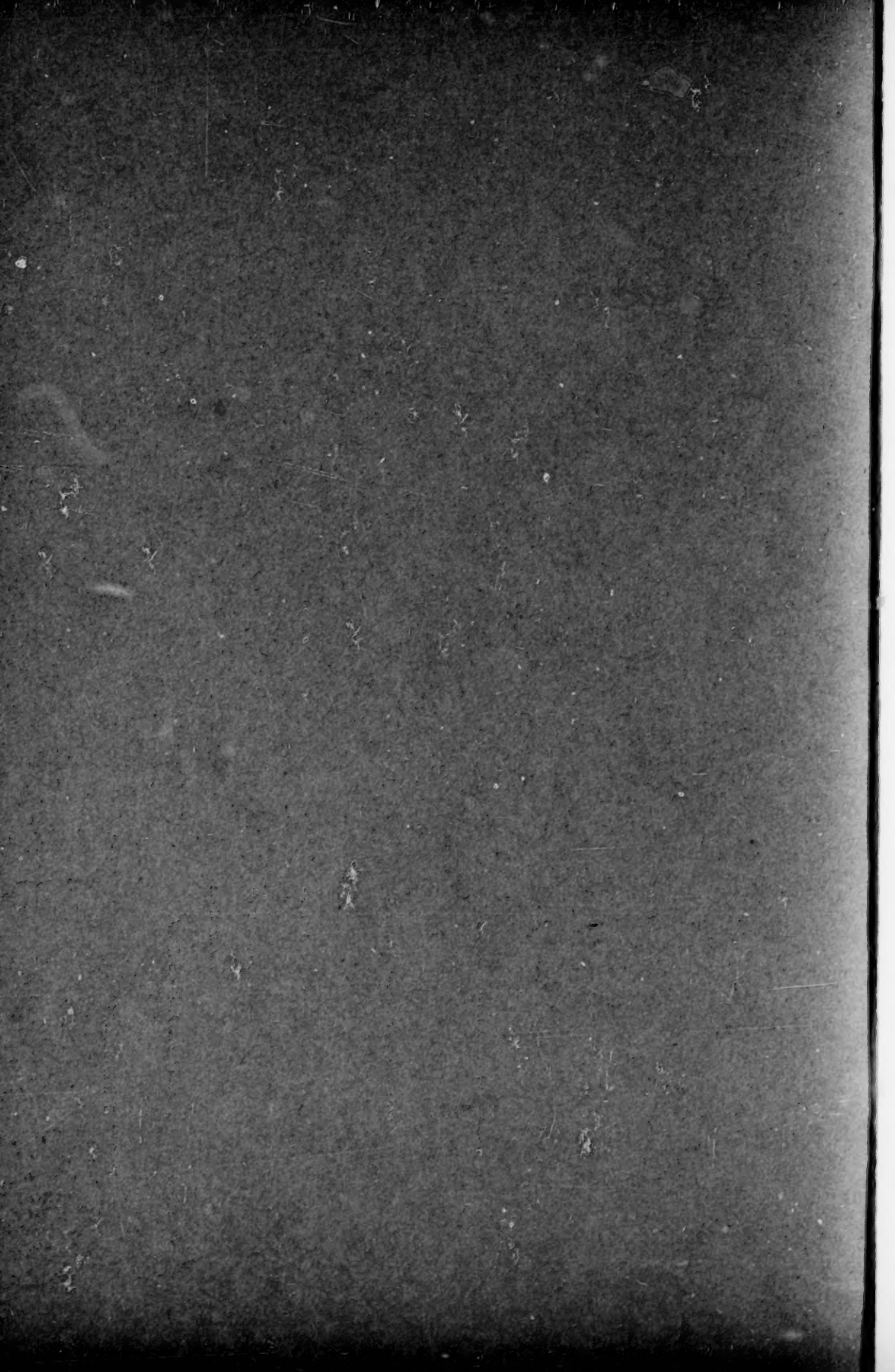
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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1990  
No. 90-575

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TIGER INN,

*Petitioner,*

—v.—

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*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF NEW JERSEY

---

**PETITIONER'S REPLY MEMORANDUM  
IN FURTHER SUPPORT OF PETITION  
FOR A WRIT OF CERTIORARI AND  
APPLICATION FOR STAY**

---

Petitioner Tiger Inn submits this reply memorandum in further support of its petition for a writ of certiorari and its application for a stay of the order of the Supreme Court of New Jersey pending completion of proceedings in this Court. The initial papers dealt with preservation of the constitutional question by Tiger Inn, the power of this Court to review the conclusions of the lower court, the conflict between the lower court's decision and decisions of this Court, the likelihood that this Court would reverse, the importance of the question presented by this case, the need for a stay, and other matters. The opposing papers focused primarily on the merits (conflict

of the lower court's decision with decisions of this Court and the likelihood that this Court will reverse).

Because of the maze of arguments on the merits in the opposition papers, Tiger Inn files this reply to re-identify the issue presented to this Court for review: may the members of a private social organization which satisfies all the criteria for the protection of the federal constitutional right to freedom of association be deprived of that right by virtue of a few tenuous connections with a public institution?

The Supreme Court of New Jersey ruled that the right could be taken away because of the connections. *Frank v. Ivy Club*, 120 N.J. 73, 576 A.2d 241 (1990). (Appendix to Petition "A." at 1.) This was the basis for the decision in the Court below, it was the sole basis, it is an issue never considered by this Court, and it is one which will undoubtedly arise in numerous other litigations involving private social organizations. We respectfully urge that it be clarified by this Court.

The Court below determined that, because of three factors, Tiger Inn was a "part" of Princeton University and that, because Princeton University was "a place of public accommodation" (an issue never litigated in this or any other case), Tiger Inn was also a place of public accommodation and not entitled to the federal right. The New Jersey Court relied on no other issues, facts, or circumstances to find against Tiger Inn. The three factors used by the New Jersey Supreme Court to deprive Tiger Inn's members of their right to freedom of association lack the substance to sustain this severe result.

In our petition we dealt with the issue of Princeton's "reliance" on Tiger Inn to feed undergraduates. (Petition "Pet." at 5.) Aside from the outright denial of reliance by the University's general counsel (Pet. at 5; Record below "R." at 3070a, 3065a-66a, 3072a), we fail to see how an educational institution with large and varied dining facilities that feed more than 3,000 students could not feed the 120 members of Tiger Inn if that became necessary.

We have also shown that the second factor (the Princeton student body is the source of Tiger Inn's undergraduate members) has no substance. (Pet. at 5.) If anything, this factor is evidence of exclusivity and personal choice, *i.e.*, membership is not routinely available to the community at large. And this criterion is no different than a private social organization limiting its membership to any other identifiable group.

The third factor ("The Clubs are held out as part of a club system which serves Princeton students") has no substance relating to Tiger Inn. As far as the University is concerned, Tiger Inn is an "unperson" in the tradition of Orwell's *1984*. It is not listed by the University as a dining facility, as a social facility, or as an organization related in any way to the University. In fact, as far as we can tell, it is not listed by the University in any way whatsoever (the twelve other eating clubs are listed). Princeton has no dean or other person in charge of "the clubs," let alone Tiger Inn (the Tiger Inn graduate board is in charge). It does not discipline Tiger Inn members for conduct at Tiger Inn (the Tiger Inn graduate board disciplines). University proctors may not set foot on Tiger Inn's grounds (the local police are called if necessary). (R. at 721a-22a, 5327a, 5380a; Testimony of Thomas Wright, August 4, 1986 "Wright" at 74-76.)

Princeton University and the eating clubs have a meal exchange program. Tiger Inn does not participate. Neither does Tiger Inn participate in University or club intramural athletic programs (the eating clubs participate in these programs). (Exhibits to Tiger Inn's motion dated October 28, 1987.) Tiger Inn refused to participate in financial studies of the eating clubs sponsored by Princeton University (the eating clubs participated). (Testimony of Stuart Rickerson, August 1, 1986 "Rickerson" at 114-15; Wright at 74-75.)

Tiger Inn is not a member of the Prospect Foundation, which supports the libraries and study facilities of the eating clubs. (R. at 723a, 3169a.) Contrary to Respondent Frank's argument (she has probably never seen it), the Tiger Inn

“library” is about the size of the collection of books an ordinary undergraduate would accumulate during his four year course of studies and is composed of the usual useless sets of novels and poems by unread authors in many volumes printed decades ago and gathering undisturbed dust.

Respondent Frank draws a picture of Tiger Inn as if it were a public restaurant during a continuous New Year's eve: endless parties, guests in every corner, unknown persons wandering about aimlessly, and women everywhere at all times. This may be true of other eating clubs, but it is not true of Tiger Inn. In fact, no person may be present in the club building or on the club grounds unless expressly invited by a member. On the few party weekends each year, each guest must also have a pass; and personnel hired from public security agencies, not University personnel, are retained by Tiger Inn to enforce the restrictions. At times Tiger Inn is closed to all but members; for some functions, no guests are permitted at all; and for others, like every other private social organization, Tiger Inn allows each member to bring any guest he might choose. To no one's great surprise, some of these guests are women. (R. at 721a, 5379a; Rickerson at 150-51.)

The briefs submitted in opposition to the pending petition and the pending motion confuse the issue presented to this Court with other issues that were not brought here by anyone for review, were not the basis for the decision in the Court below, or were, in effect, decided in favor of Tiger Inn in the Court below. The Court below recited without adverse conclusion the facts which show Tiger Inn to be a private organization (A. at 7a-11a.) and rested its decision entirely on the three supposed connections with a public institution. As a consequence, all of the lengthy discussion of numbers of members, admissions procedures, social functions at Tiger Inn, access by the public, etc., are irrelevant to the issue presented here and ought not to be used as a basis for this Court's decision on the pending applications. In any event, many of the facts recited in the opposition briefs do not involve Tiger Inn (but are treated as if they do) or occurred

long before the period involved in this lawsuit. A few examples follow:

Respondent speaks at length of numbers of members and criteria for membership. Clearly, the day to day life of Tiger Inn is lived and breathed by its undergraduate members, whose number has fluctuated widely over the recent years. They eat three meals a day together, study, play cards, shoot pool, and enjoy their other social activities in a far more concentrated personal association than almost any other private club. As one witness put it, "The membership has to feel 100 percent about an individual that they would like that person to join as a member and share the next year or two." (Rickerson at 110-11, 153-55.) Tiger Inn also has somewhat more than 1600 graduate and other members, many of whom never set foot in Tiger Inn after graduation. They have virtually nothing to do with the life of Tiger Inn or its undergraduate members.

Relying on the decisions in *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537 (1987) and *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), Respondent argues that, by numbers alone, Tiger Inn's members do not enjoy the kind of intimate social relationship protected by the Constitution. (Brief in Opposition "Opp." at 12-13.) But the Rotary organization had 907,750 members in 19,788 chapters in 157 countries [481 U.S. at 540]; and the Jaycees had 295,000 members in 7,400 chapters in 51 states plus 11,915 associate members, many of whom were women. [468 U.S. at 613.] As the concurring opinion in the *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988), states, even clubs with more than 400 members "may still be relatively intimate in nature, so that a constitutional right to control membership takes precedence." [487 U.S. at 19.]

As far as selectivity and the acceptance rate are concerned, the selection process begins its winnowing much earlier than the final acceptance pool. The candidates are identified before bicker through participation with members on athletic teams, sharing of dorm facilities, attendance in common

classes, and service in campus organizations. Some who become candidates are cut during bicker; and for those who last to the final pool, bids are awarded to some but never all. Tiger Inn has never offered membership to anyone without the 100% vote of the undergraduate members, has never accepted a member through any "hat-bid" procedure, and has certainly never participated in a "dice-roll" for membership of a candidate. (Rickerson at 112; R. at 3167a.) Once again, this may be true for others but not for Tiger Inn (another example of Respondent's use of facts relating to others in an effort to make a case against Tiger Inn). These are precisely the criteria for a private social organization protected by the Constitution.

Mindful of the need for brevity, we halt this recitation and ask the Court to note any reference by Respondent to "the clubs" or "a club." That means Tiger Inn was not involved (or even refused to be involved), but Respondent would like Tiger Inn to be tarred with the event anyway.

In addition, Respondent relies heavily on the three recent decisions of this Court, *Roberts*, *Rotary*, and *New York Club Association*, but reads them in a way that would extinguish all private social organizations (if the organization is more than a family in nature, it is not protected). That was not the holding or the rationale for the result in those cases.

In *Roberts*, the Jaycees case, the Court noted "the changing nature of the American economy and . . . the importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women." It then commented on "the various commercial programs and benefits offered to members" and held that women should have "equal access to such goods, privileges, and advantages. . . ." [468 U.S. at 626.]

In *Rotary International*, the Court noted that the Rotary is "an organization of business and professional men;" that it "includes a representative of every worthy and recognized



business, professional, or institutional activity in the community" that it has "businesslike attributes" including a "complex structure, large staff and budget, and extensive publishing activities;" that its membership is intended to "raise the standards of the members' businesses and professions," and that members are "encouraged to invite business associates and competitors to meetings." [481 U.S. at 539, 540, 542-43, 546, and 547.]

Because the New York City ordinance in the *New York Club Association* case was aimed directly at organizations in which business was transacted, no litany of quotations is necessary. The concurring opinion succinctly stated the core of that case as follows:

"Predominately commercial organizations are not entitled to claim a First Amendment associational . . . right to be free from the anti-discrimination provisions triggered by the law." [487 U.S. at 20.]

Confronted with the fundamental undisputed fact that no business is conducted by Tiger Inn or on its premises, the rationale for the outcome of these three cases is inapplicable.

Whether we speak of eating clubs (Princeton University), Final Clubs (Harvard University), Senior Societies (Yale University), fraternities (virtually every university, including Princeton), sororities (virtually every university, including Princeton), or the many other truly private, truly social organizations, they are essentially the same. In fact, in 1979, Respondent filed a claim of discrimination against Tiger Inn under the federal statute; but it was dismissed on the ground that Tiger Inn was exempt because it was "a social fraternity . . . , the *active* membership of which consists primarily of students in attendance at an institution of higher learning . . ." (emphasis supplied); (20 U.S.C. § 1681(a)(6)(A); Letter Order from Tejada, Director, Office of Civil Rights, to Bowen, President, Princeton University, dated April 25, 1980.)

Respondent's effort to distinguish fraternities and make Tiger Inn a case of injustice too small to be corrected by a busy court involved in questions of national policy is belied by the brief of the National Interfraternity Conference filed in support of Tiger Inn's petition. Leaving aside the many public statements by Respondent and the New Jersey Division on Civil Rights about the broad significance of this case (e.g., Pet. at 13-14), the amicus brief makes its national impact clear; and so does the national press and television coverage it has received.

Tiger Inn is the quintessence of the private social institution founded on the constitutional right to freedom of association. Whether a private social organization may be deprived of its federal right by virtue of ties with a public organization has not been considered by this Court in the past but is a significant issue in present and future litigation involving private social organizations, e.g., *Schkolnick v. The Fly Club*, 81 BPA-0097 (Mass. Comm. Against Discrimination, March 24, 1990). The thoroughly litigated record in this case (more than 9,000 pages) will allow a careful resolution of this question. Therefore, we respectfully urge this Court to grant the petition for certiorari. We also respectfully request that the decision below be stayed until resolution of the case.

Respectfully submitted,

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January 4, 1991



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No. 90-575

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

TIGER INN,

*Petitioner,*

— v. —

SALLY FRANK,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF NEW JERSEY

**BRIEF OF AMICUS CURIAE NATIONAL INTER-  
FRATERNITY CONFERENCE IN SUPPORT OF  
THE PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF NEW JERSEY**

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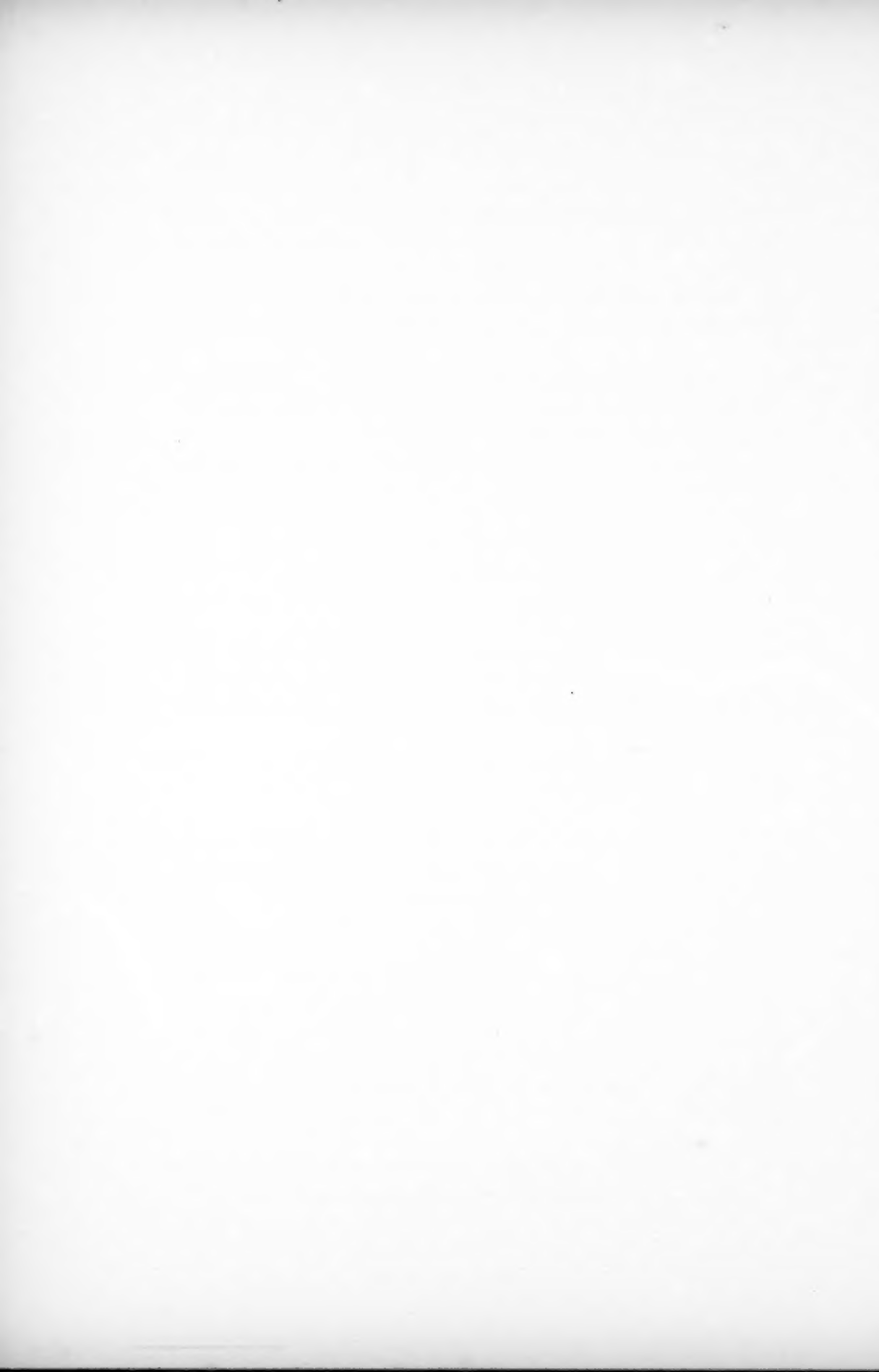


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**BRIEF OF AMICUS CURIAE NATIONAL INTER-  
FRATERNITY CONFERENCE IN SUPPORT OF  
THE PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF NEW JERSEY**

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**INTEREST OF AMICUS CURIAE  
NATIONAL INTERFRATERNITY CONFERENCE**

The National Interfraternity Conference ("NIC") was founded in 1909 as an organization for national and international men's college social fraternities. It is presently composed of 59 such fraternities with approximately 5600 chapters and colonies at nearly 900 colleges and universities; those chapters and colonies have approximately 400,000 active student members and nearly four and one-half million alumni. NIC, *Annual Report 1989*. The vast majority of the student members belong to chapters and colonies at campuses in the United States (fewer than 100 of the chapters and colonies are in Canada).



Of the approximately 5600 student groups, all but 32 are affiliated with the 58 NIC member fraternities that restrict their membership to men. A significant number of the groups have similar or even closer relationships with their "host" institutions than the eating clubs' relationship with Princeton University that is the factual basis for the judgment and opinion of the Supreme Court of New Jersey in this case. See, e.g., *Baird's Manual of American College Fraternities* 10-11, 23, 45-244 (19th ed. 1977); Comment, *Discrimination on Campus: A Critical Examination of Single-Sex College Social Organizations*, 75 Calif. L. Rev. 2117, 2137-39 (1987). Furthermore, that judgment and opinion, in prohibiting the eating clubs from restricting their membership to men, applied an anti-discrimination statute similar in relevant respects to statutes in a majority of the states. See, e.g., Comment, *Discrimination on Campus*, *supra*, at 2124-26. Thus, the decision provides a precedent that threatens the membership practices of thousands of the student chapters and colonies of the NIC member fraternities, to which hundreds of thousands of members of those fraternities belong.

### SUMMARY OF ARGUMENT

College student organizations such as Princeton's eating clubs and the nation's fraternities and sororities are entitled to the protection of the federally guaranteed right of private association. The decision by the Supreme Court of New Jersey in this case refused to recognize that entitlement. Its conclusion that the eating clubs' relationship with Princeton University precludes them from being a private association is both unsupported by the federal cases cited to support that conclusion and conflicts with the implications of this Court's decision in *Healy v. James*, 408 U.S. 169 (1972).

The decision below and the potential cost of fighting its extension to thousands of similar college student groups across the country present a grave threat to the right of private association at the nation's colleges and universities.

## ARGUMENT

### POINT I

#### The Decision of the Supreme Court of New Jersey Conflicts With Federal Law As Applied in Prior Decisions of This Court And Lower Federal Courts.

This Court's decision in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and its legion of progeny have established that the Bill of Rights of the United States Constitution guarantees and protects the right to freedom of association. This right extends to college students in their campus organizations. *Healy v. James*, 408 U.S. 169 (1972).

More recently, this Court has defined the freedom of association to include a right of private association, which protects groups that are congenial, relatively small, selective in their membership practices, and secluded from non-members in critical aspects of the association. See *Board of Directors v. Rotary Club*, 481 U.S. 537, 546 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984).

College social organizations such as the Princeton eating clubs and the nation's fraternities and sororities are paradigms of such groups, matching well each of these criteria, as commentators have nearly unanimously concluded. See Harvey, *Fraternities and the Constitution: University-Imposed Relationship Statements May Violate Student Associational Rights*, 17 J.C.U.L. 11, 23-26 (1990); Jones, *The Future of Single Sex Fraternities*, *Fraternal Law*, January 1988, at 1, 3-4; Harmon, *Single Sex Status of Fraternities*, *Fraternal Law*, January 1985, at 1, 2-3; Linder, *Freedom of Association After Roberts v. United States Jaycees*, 82 Mich. L. Rev. 1878, 1886 (1984); Manley, *Fraternal Selectivity v. Jaycees Commerciality*, *Fraternal Law*, September 1984, at 1-3; Note, *Alcohol and Hazing Risks in College Fraternities*, 7 Rev. of Lit. 191, 193 n.6 (1988); Note, *Freedom of Association: The Attack on Single-Sex College Social Organizations*, 4 Yale L. & Pol'y Rev. 426, 433-44 (1986). But see Comment, *Discrimination on Campus*, *supra*, at 2142-47.

Although Petitioner Tiger Inn urged this same conclusion below, the Supreme Court of New Jersey did not address the applicability *vel non* of the right of private association. Inescapably implicit in its holding, however, is either (a) that the legislative policy of the State of New Jersey embodied in the anti-discrimination statute at issue is superior to that right, or (b) that the eating clubs cannot for some other reason invoke the right of private association.

The failure by the court below to provide an explicit justification for its conclusion is at best a subtle affront to the Supremacy Clause and the Bill of Rights. It certainly does not evidence the heightened scrutiny that governmental encroachment on associational rights requires. See *New York Club Assoc. v. City of New York*, 487 U.S. 1, 15-16 (1989). In fact, given the decisions of this Court on the nature of the right of private association and its close match with the nature of the eating clubs, the decision below is a violation of that right.

The decision of the court below advanced as its legal underpinning a line of federal and New Jersey cases purportedly holding that a symbiotic and integral relationship between a private association and a place of public accommodation destroys the private nature of the association. See *Frank v. Ivy Club*, 120 N.J. 73, 104, 576 A.2d 241, 257 (1990); see also *id.*, 228 N.J. Super. 40, 52, 548 A.2d 1142, 1148 (Super. Ct. App. Div. 1988). Commentary has advanced this same argument. See Comment, *supra*, *Discrimination on Campus*, at 2137 n. 127.

The federal cases relied upon to maintain this argument, however, all concerned situations in which one of two important policy considerations played a critical role. Neither of these considerations is present in the case at bar.

The federal cases each involved either: (a) discrimination by a private commercial establishment that was physically a part of a place of public accommodation; or (b) discrimination by a private association of public employees that was closely associated with their public employer. See *Adams v. Miami*

*Police Benevolent Assoc.*, 454 F.2d 1315 (5th Cir.), *cert. denied*, 409 U.S. 843 (1972); *Franklin v. Order of United Commercial Travelers*, 590 F. Supp. 255 (D. Mass. 1984); *United States v. Medical Soc.*, 298 F. Supp. 145 (D.S.C. 1969); *United States v. Beach Assoc.*, 286 F. Supp. 801 (D. Md. 1968); *Pinkney v. Meloy*, 241 F. Supp. 943 (N.D. Fla. 1965). In the first group of cases, the overtly commercial nature of the activity in question both implicated the governmental interest in regulating commerce and failed to implicate any private associational rights. In the second, the activity in question clearly implicated the right to equal access to direct economic benefits from the state, an interest wholly absent in the present case. Without either of these critical considerations, there is no basis to apply the holdings of these decisions as precedent, much less to invoke them to overrule the constitutionally guaranteed right to freedom of association.

There is an additional problem with the New Jersey Supreme Court's conclusion that the relationship of the eating clubs with Princeton University determined that they were not private associations. The right to freedom of association of the members of a college student organization generally entitles the organization to recognition by the students' college. *See Healy v. James*, 408 U.S. 169 (1972).<sup>1</sup> It would be ironic indeed if a group of students could seek the institutional relationship to which freedom of association entitles them only at the risk of destroying any further right to invoke that freedom. As a result, there must be a corollary principle that this relationship cannot itself confer a public character on a private association. *Cf. Widmar v. Vincent*, 454 U.S. 263, 271 n.10 (1981) (university recognition does not amount to official endorsement of ideas of student organization). Otherwise, the right of private association could effectively have no existence at a college or university campus. *See Healy v. James*, 408 U.S. at 176, 181-82.

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<sup>1</sup> *Healy* dealt solely with the issue of a public university. In New Jersey, however, private universities are subject to state constitutional restrictions that federal law applies to public universities. *See State v. Schmid*, 84 N.J. 535, 553-69, 423 A.2d 615, 625-35, *appeal dismissed*, 455 U.S. 100 (1982).

In *Borough of Glassboro v. Vallorosi*, 117 N.J. 421, 568 A.2d 888 (1990), the New Jersey Supreme Court held that a group of unrelated college students living together and sharing meals was the "functional equivalent" of a family and protected from governmental interference in the form of zoning. It is precisely the family and family style relationships that are the focus of the right of private association. *Board of Directors v. Rotary Club*, 481 U.S. 537, 545, 547 n.6 (1987). There are differences between the group of students in *Vallorosi* and the eating clubs at Princeton, for example, few of the eating club members at Princeton actually live together (as distinguished from many fraternities and sororities). The *Vallorosi* decision nonetheless highlights that the same court's decision in *Frank v. Ivy Club* inadequately considered the nature of the eating clubs, the relationships among their members, and the associational rights they deserve.



## POINT II

**The Legal Uncertainty Created by the Decision  
Below Urgently Needs to Be Addressed.**

There are two reported cases on whether a relatively small, selective, social organization of college students is a private association entitled to restrict its membership on the basis of gender. These two decisions reached opposite conclusions. *Compare Schkolnick v. Fly Club*, No. 87-BPA-0097 (Mass. Comm. Against Discrimination, March 24, 1990) (Harvard final club was not a place of public accommodation) *with Frank v. Ivy Club*, 120 N.J. 73, 576 A.2d 241 (1990). There will doubtless be further challenges to such membership practices, spurred especially by the latter decision.

There are thousands of such organizations across this country, as noted *supra* and in the petition (at 14). They are virtually all non-profit organizations with limited resources. They cannot afford to litigate their constitutional rights on a case by case basis. Attacks on their membership practices under state anti-discrimination statutes could destroy these organizations simply from the cost of defending their members' right of private association. Even the threat of such litigation is a cost that would not only chill their exercise of that right but could freeze it out entirely. The case at bar provides an efficient and early means to forestall any such nationwide struggle.

It is one thing for a state's constitution to entitle its citizens to broader rights than guaranteed by federal law. It is quite another for a state law effectively to vitiate a right guaranteed by the United States Constitution. The injustice is only compounded when such a result is visited upon students who are sorely limited in their ability to fight for the rights. The best possible lesson for the nation's college and university students would be that federal law stands by their side against the unconstitutional application of state statutes.

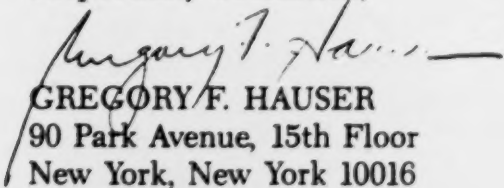


## CONCLUSION

For the foregoing reasons, the NIC respectfully urges that this Court issue a writ of certiorari to review the decision of the Supreme Court of New Jersey.

Dated: October 31, 1990

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